2697

SUPREME COURT OF THE UNITED STATES.

No. 260.

THE UNITED STATES, APPELLANTS,

vs.

JOHN ROSE AND GEORGE KINLOCK.

APPEAL FROM THE DISTRICT COURT UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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Proceedings before Land Commission.

OFFICE OF THE BOARD OF COMMISSIONERS
To ascertain and settle the private land claims in the State of Cal'a.

Be it remembered, that on this nineteenth day of February, anno Domini one thousand eight hundred and fifty-three, before the commissioners to ascertain and settle the private land claims in the State of California, sitting as a board in the city of San Francisco, in the State aforesaid, in the United States of America, the following proceedings were had, to wit:

The petition of John Rose et al., for six square leagues of land in Yuba county, was presented, and ordered to be filed and docketed with No. 605, and is as follows, to wit:

(Vide page 5 of this Transcript.)

Upon which proceeding the following subsequent proceedings were had in their chronological order, to wit:

SAN FRANCISCO, *December* 5, 1854.

Case No. 605, John Rose et al., for six square leagues of land in Yuba county, was ordered to be placed at the foot of the 3d class cases on the trial docket.

SAN FRANCISCO, *December* 19, 1854.

Case No. 605 was submitted, under the rule of 21 March, 1855.

SAN FRANCISCO, *December* 26, 1854.

In the same case, the counsel for the claimant filed the following petition and affidavit, to wit:

(Vide page 3 of this Transcript.)

And the prayer of the petition therein was taken under advisement by the board.

SAN FRANCISCO, *January* 2*d*, 1855.

In the same case, Commissioner Alpheus Felch delivered the opinion of the board upon the petition heretofore filed by the claimants' counsel, to wit, on the 26 December, 1854, granting the prayer of the petitioner.

Ordered that this case be placed at the foot of the 4th class on the trial docket.

SAN FRANCISCO, *January* 29, 1855.

In the same case, the deposition of John Smith, a witness in behalf of the claimants, taken before Commissioner Peter Lott, was filed.

(Vide page 7 of this Transcript.)

SAN FRANCISCO, *February* 1, 1855.

In the same case, the counsel for the claimants filed the following affidavit, to wit:

(Vide page 29 of this Transcript.)

SAN FRANCISCO, *February* 2, 1855.

In the same case, the deposition of John Bidwell, a witness in behalf of the claimants, taken before Commissioner Peter Lott, was filed.

(Vide page 10 of this Transcript.)

SAN FRANCISCO, *February* 17, 1855.

In the same case, the counsel for the claimants filed the following stipulation, to wit:

(Vide page 27 of this Transcript.)

SAN FRANCISCO, *February* 19, 1855.

In the same case, the deposition of Michael C. Nye, a witness in behalf of the claimants, taken before Commissioner Peter Lott, was filed.

(Vide page 12 of this Transcript.)

SAN FRANCISCO, *February* 26, 1855.

In the same case, the deposition of John A. Sutter, a witness in behalf of the claimants, taken before Commissioner Peter Lott, was filed.

(Vide page 13 of this Transcript.)

SAN FRANCISCO, *March* 13, 1855.

Case No. 605 was submitted without argument, and taken under advisement.

SAN FRANCISCO, *May* 22, 1855.

In the same case Commissioner S. B. Farwell delivered the opinion of the board, confirming the claim.

(Vide page 37 of this Transcript.)

And the following order was made, to wit:

(Vide page 40 of this Transcript.)

Petition and Affidavit.

JOHN ROSE et al.
vs.
THE UNITED STATES. } 605.

To the Hon. the Board of United States Land Commissioners to settle and ascertain private land claims in California:

Your petitioner, John Rose, respectfully represents, that he is one of the claimants in the above case, and caused said claim to be

presented before this hon. board by his counsel, Robert Rose; that he came twice to this city to give his personal attention to this cause, but was informed that his said counsel was in the city of Washington, and was shortly expected home. Immediately after this last visit, your petitioner was taken sick and confined to his room from the first of March to the beginning of June last; and such has been the condition of his health since, that he has not been able, until within the last month, to give his personal attention to his business. And your petitioner further represents, that on the 14th or 15th day of this month he received a letter from his said counsel, Robert Rose, dated the 28th of the previous month, informing him that he should now prepare his case for trial; that it was in the 4th class of cases upon the calendar, and advising him without delay to bring in his witnesses. Your petitioner immediately came to this city, and ascertained that his counsel was mistaken; that his case was in the third and not the fourth class of cases, and was *actual*, under a rule of this hon. board, submitted on Tuesday last for final adjudication.

Under these circumstances, the absence of your petitioner's counsel, his misapprehension in regard to the position of his case on the docket, and his long sickness and feeble state of health, rendering it impossible for him to give his personal attention to his business, he prays that the said submission may be set aside, his case returned to the docket, and he be permitted to take such evidence as may be necessary to perfect his claim.

San Francisco, Dec. 20, 1854.

JOHN ROSE.

Subscribed and sworn to before me.

ALPHEUS FELCH, *Com'r.*

Filed in office Dec. 26, 1854.

(Signed) GEO. FISHER, *Sec'y.*

Petition.

To the Hon. Board of Commissioners for settling private land claims in California:

The petition of John Rose and George Kinlock respectfully shows:

That heretofore, some time in or about the year 1844, Manuel Micheltorena, by virtue of authority in him vested as governor of California, granted to John Smith a tract of six square leagues, situated in the present county of Yuba, and bounded as follows, to wit: "on the north by the Yuba river, on the west by the eastern boundary of Captain Sutter's land, on the south by Johnson's rancho, and by a line extending easterly, to include six square leagues."

That on the 12th of August, 1852, said John Smith sold and

conveyed unto your petitioner said tract of land as set forth in the deed of conveyance herwith submitted, marked B.

That said land has been since the date of the grant, and now is, in the quiet and undisputed possession of your petitioners, and those under whom they hold.

Your petitioners further show, that the title-papers to said land have been lost.

That they rely for the confirmation of their claim upon the testimony of witnesses to be duly produced before this hon. board.

Wherefore they pray confirmation of their claim to said land.

ROSE, *For Claim'ts.*

Filed in office Feb'y 19, 1853.

GEO. FISHER, *Sec'y.*

Recorded in vol. 1 of Petitions, on pages 591, 592.

GEO. FISHER, *Sec'y.*

Deposition of John Smith.

UNITED STATES OF AMERICA,
State of California.

SAN FRANCISCO, *January 28th*, 1855.

This day came before Peter Lott, commissioner for taking testimony to be used before the board of U. S. land commissioners in said State, John Smith, a witness on behalf of claimants, John Rose et al., in case No. 605 on the docket of said board, and said witness, being sworn, deposes as follows:

The U. S. land agent is present.

Questions by Mr. Williams, for Claimants.

1st question. What is your name, age, and place of residence?

Answer. My name is John Smith, my age is forty-seven years, and I reside on Russian river, Mendocino county, California.

2d question. Are you acquainted with the rancho de Yuba, claimed in this case; if yea, to whom *it was* granted by the Mexican government, and when?

Answer. I am acquainted with the said rancho; it is in Yuba county; it was granted to me; I petitioned for it in 1844, to Governor Micheltorena, and obtained from Genl. Sutter a favorable report. Afterwards, in 1845, Genl. Sutter delivered me a title which he was authorized to give me by Micheltorena.

3d question. What became of the papers above referred to, viz: the petition to Micheltorena, and the reports or certificates thereon, and the document delivered to you 1845 by Genl. Sutter, and where are they now?

Answer. In the summer of 1845 I went over to Mr. Hardy's to get him to survey my land for me, and I took my papers with me;

on my return *him* I attempted to ford the Sacramento river about nine miles above the old crossing; my horse became frightened and got off the bar into the deep water and was drowned; I lost my horse, saddle, bridle, papers and all. The papers were in a tin case, and were lost entirely. I immediately after made this known to Genl. Sutter, and he required me to address him a sworn petition stating the facts, and asking for a copy of the paper he had, which he had before given me. This I did; Mr. Bidwell prepared for me the petition, and Genl. Sutter then gave me the copy of said document.

I came to this country in 1835 with Capt. Wilson, and he told me to give him the last mentioned papers, and he would take them to Los Angeles, and procure for me the approval of the departmental assembly; I gave them to him, and have never been able to hear of them since, though I made efforts to recover them.

4th question. What were the dates of your petition to Micheltorena, and Sutter's report in your favor?

Answer. They were both dated, I think, in September, 1844, which was the time I petitioned, and obtained the favorable report of Gen'l Sutter.

5th question. Were you a naturalized citizen of Mexico?

Answer. I was naturalized early in 1844, and believe my naturalization papers were given me by Governor Micheltorena, but those letters were also lost.

6th question. What improvements, if any, did you place on this land?

Answer. In 1844 I built a house on it; planted some seventy-five peach trees; and in that year and 1845 I ditched all around three sides of a field of one hundred acres; the other side was bounded by the river; I cultivated this field in wheat, corn, potatoes, and other vegetables; I tried potatoes two years, but they would not grow; in 1844 I had about six hundred cattle, and a few horses, on this land; they were afterwards increased in numbers; I continued to live there until I sold out in 1848.

Cross-examined by Associate Law Agent.

1st question. Did this title from Sutter to yourself show Sutter's authority to deliver it to you?

Answer. I cannot read Spanish, and therefore cannot say, but Gen'l Sutter told me he was authorized.

2d question. Did you get Hardy to survey your ranch, and what office did Hardy hold?

Answer. He was to have come over the following week, but I sent him word not to come; that I had lost my papers, and I did not know then that I could get other papers.

3d question. Was any survey, official or private, ever made of this land?

Answer. Mr. Bidwell made a rough survey of it to ascertain where the lines would run; and he made a map of it, showing the extent of the six leagues.

4th question. Was the approval of the departmental assembly ever obtained to this grant?

Answer. I do not know; Capt. Wilson can tell that; I never got the papers from him.

5th question. What kind of a house was it you built on the land?

Answer. It was about 35 or 40 feet by sixteen, partly adobe and partly sticks, put upright and weeded.

JOHN SMITH.

Subscribed and sworn to before me on this 27th day of January, A. D. 1855.

PETER LOTT, *Commissioner.*

Filed in office Jan. 29, 1855.

GEO. FISHER, *Sec'y.*

Recorded in Ev. B, vol. 11, p. 288.

GEO. FISHER, *Sec'y.*

Deposition of Jno. Bidwell.

UNITED STATES OF AMERICA,
State of California, ss.

SAN FRANCISCO, *January* 22, 1855.

This day came before Peter Lott, commissioner for taking testimony to be used before the board of U. S. land commissioners in said State, John Bidwell, a witness on behalf of the claimants, John Rose et al., in case No. 605 on the docket of said board, and said witness being sworn, deposes as follows:

The U. S. associate land agent present.

Questions by Mr. Williams for Claimants.

1 question. What is your name, age, and place of residence?

Answer. My name is John Bidwell; my age thirty-five years; my residence Butte county, California.

2d question. Are you acquainted with the land claimed in this case? If yea, please state its boundaries and the quantity of land contained in said tract.

Answer. I am acquainted with the land; it is bounded on the north by the Yuba river, on the west by Sutter's claim, on the south by Johnson's ranch, and extends eastwardly so as to contain six square leagues.

3d question. To whom and by whom was said tract granted?

Answer. It was granted to John Smith by Governor Micheltorena.

4th question. Did you ever see the grant and accompanying documents? If yea, please state all you know in regard to them.

Answer. This was one of the tracts of land embraced in what was known as the "general title of Micheltorena," the original of which is filed in the claim of Samuel J. Hensley before this board; I saw Gen'l Sutter deliver to John Smith a copy of said original title; at said Smith's request, I prepared for him a petition to Gen'l Sutter, as alcalde, setting forth the fact that he had lost his original *espedente*, with the certificates and decrees that usually accompany such documents, in crossing, I believe, the Sacramento river, and praying for a copy of said general title, to which he was entitled, his original papers bearing date previous to the date of said general title; Gen'l Sutter, knowing these facts, delivered to him a copy of said title as he requested; this occurred, I think, in the spring of 1845.

5th question. State what you know in regard to the occupation of this land by said John Smith.

Answer. John Smith had purchased of Gen'l Sutter an adjoining tract of land in 1844, upon which he built a house and lived; after that, I think in the fall of 1844, or early in 1845, he built another house on the tract claimed in this case; the house was an adobe house; he made also ditches and corrals, and had upon it about four hundred head of cattle; said Smith continued to live from that time till he sold out his interest in this land, which was, I think, in the fall of 1848.

6th question. Look upon the map marked D, and filed on the 8th of March, 1852, in William Johnson's case, No. 91, and state by whom said map was made, and whether or not the land claimed in this case is marked thereon.

Answer. I made the map myself, I think in the year 1844; the tract of land marked thereon Rancho de Yuba is the land claimed in this case; though that map is not in all respects accurately correct, it is sufficiently so, as to the northern, southern, and western boundaries, to survey and accurately locate the land.

J. BIDWELL.

Subscribed and sworn to before me January 22d, 1855.

PETER LOTT,
Commissioner.

Filed in office February 2, 1855.

GEO. FISHER, *Sec'y.*

Recorded in Ev. B, vol. 11, p. 326.

GEO. FISHER, *Sec'y.*

Deposition of M. C. Nye.

UNITED STATES OF AMERICA,
State of California, ss.

SAN FRANCISCO, *Feb'y* 16, 1855.

This day came before Commissioner Lott, and was sworn, Michael

C. Nye, who testified for claimants, John Rose et al., in case No. 605 in said commission, as follows:

The U. S. associate land agent, Mr. Blanding, is present.

Questions by Judge Thornton for Claimants.

Question by Claimants' Counsel.

1st. What is your name, age, and place of residence?

Answer. My name is Michael C. Nye; my age is thirty-four years; my residence in Butte county, California.

2d. Are you acquainted with John Smith, the original grantee of the land in this case, and with the present claimants?

Answer. One William Foster and myself bought this tract of land from said Smith, but there was no deed executed to us by said Smith; Foster and myself afterwards sold the same to the present claimants, and then Smith, the deed that is on 12th of August 1852, to the present claimants.

Question by Land Agent.

How do you know that Smith executed the deed to claimants?

Answer. I was not a witness to this deed, but I have seen it with the certificate of probate upon it; and they have been in possession, claiming under their purchase, to this time, with my knowledge and consent, and also of said Foster.

M. C. NYE.

Subscribed and sworn to before me, on this 16th day of February, 1855.

PETER LOTT,
Commissioner.

Filed in office Feb'ry 19, 1855.

GEO. FISHER, *Sec'y.*

Recorded in Ev. B, vol. 11, p. 428.

GEO. FISHER, *Sec'y.*

Deposition of Jno. A. Sutter.

UNITED STATES OF AMERICA,
State of California, ss.

SAN FRANCISCO, *February* 24, 1855.

This day came before Peter Lott, commissioner for taking testimony to be used before the board of U. S. land commissioners in said State, John A. Sutter, a witness on behalf of the claimants, John Rose et al., in case No. 605 on the docket of said board, and said witness being sworn, deposed as follows:

The U. S. land agent present.

Questions by Judge Thornton for Claimants.

1st question. What is your name, age, and place of residence?

Answer. My name is John A. Sutter; my age 52 years; my residence in Sutter county, California.

2d question. Are you acquainted with John Smith, the original grantee in this case, and with the land claimed in this case?

3d question. State what you know in relation to the making and obtaining by the said Smith of his title in this case.

Answer. John Smith, the original grantee of the land claimed in this case, petitioned to Governor Micheltorena for six square leagues of land accompanying his petition, with a map or diseño, which was made or drawn, as I understood, by John Bidwell. This expediente, with the usual decree for information, directed to me, was acted upon by me, and a favorable report made by me before the 22d day of December, 1844. Smith after this, and within twelve months, occupied the land so petitioned for, made improvements, and built an adobe house, and had upon the said land about 400 head of cattle, with some horses. Upon the application of said Smith, I remember that I gave to said Smith a copy of the general title, a true copy of which is on file in this case, as he was entitled to have it. Said Smith was in possession, by my authority, of this land, and the boundaries of the said tract of land were, on the north of Yuba river, on the west my own land, and on the south by Johnson's rancho, and correspond with the map referred to in the deposition of John Bidwell, taken and on file in this case. I was informed, and fully satisfied, that in the spring of the year 1845 the said Smith lost all his documentary evidence or *espedence* in this case.

Cross-examined by U. S. Land Agent.

1st question. When, where, and in whose presence did you first see and examine the petition of John Smith to the governor for the land, and how many times, and on what occasions, have you since seen it?

Answer. I cannot remember the precise time, but it was before I reported upon the land to the governor; I saw it in my office at the fort. Major Bidwell, who wrote the petition, was present, and Smith himself, and I do not think any one else was there; that was after the petition had gone to Monterey, and been sent back again through the hand of Major Bidwell; I was then called upon for my report, and I examined the petition and did report upon it; I think this was eleven months or about a year before I gave him the general title.

2d question. Where were you when you gave him the title you speak of?

Answer. I was at the fort.

3d question. What action did you take upon said petition?

Answer. I informed the government that the land was unoccupied and did not belong to anybody?

4th question. How many times did you examine said petition and the espediente; and when was the last time?

Answer. I never saw it after the occasion I speak of, when it came back from the governor.

5th question. How long were you in examining it at that time?

Answer. Only a short time; I read it over and handed it back to Smith.

6th question. Have you ever compared the copy of the general title on file in this case with the original; if nay, how do you know it to be a true copy?

Answer. I have not heretofore compared this copy with the original, but by now reading it over, I find it to be what, according to my best recollection, is a literal copy, word for word, of said original title.

7th question. Have you retained in your memory the words of the original title so that you could now repeat them?

Answer. I have not learned them by heart, but by reading it over I remember the original.

8th question. In your direct examination in this deposition, you say that the boundaries of the ranch claimed in this case correspond with the map referred to in the deposition of John Bidwell taken and filed in this case; what map did you refer to, and state what is the knowledge you had of that map?

Answer. I referred to the map which accompanied the expediente; I examined it when the petition was presented to me for *for* my informé, and I was well acquainted with the ground; and I have read Major Bidwell's description of the ground and its boundaries, and the map corresponded with his statements in that description in said deposition; I have seen the map referred to in Bidwell's deposition in the Johnson case, to which I also referred, and Major Bidwell's statement corresponds with this map marked D, which gives the boundaries as I recollect them.

9th question. State what the boundaries were as you recollect them, and state particularly how and where your line was established, and how you know it.

Answer. On the north was the Yuba river, the west my own boundary, south Johnson's rancho, and to the east the foot-hills of the Sierra Nevada. My line was established three leagues to the east of the Feather river. It was not surveyed, but I claimed to that boundary, and it was respected and recognised as my boundary by Smith, who took the adjoining land with reference to that as my boundary.

10th question. Under what title did you claim three leagues east of Feather river, and what was the division line between the two grants?

Answer. I claimed at first up to that point, and then I could select 11 leagues where I wished; and after I took my 11 leagues,

I petitioned the government for the Sobrante. There was never a division line; I could locate where I pleased.

J. A. SUTTER.

Subscribed and sworn to before me on this 24th day of February, A. D. 1855.

PETER LOTT, *Commissioner.*

Filed in office February 26, 1855.

GEO. FISHER, *Sec'y.*

Recorded in E. B, vol. 11, p. 453.

GEO. FISHER, *Sec'y.*

Copy deposition of John A. Sutter, from No. 201.

Case No. 201 upon the docket. For confirmation of the grant of rancho Aguas Nieves.

BOARD OF COMMISSIONERS

To ascertain and settle private land claims in California.

On this 13th day of May, A. D. 1852, came before me, James Wilson, one of the commissioners, Capt. John A. Sutter, a witness offered by Samuel J. Hensley, petitioner, and being duly sworn, gave the following testimony.

Geo. Cooley, land agent of the U. S., was notified, and did attend to the taking of the testimony of said witnesses.

In answer to interrogatories propounded by petitioner's counsel, the deponent answered as follows:

I am acquainted with the handwriting of Gen'l Man'l Micheltorena, and have seen him write very often. The paper now shown me, as an original paper, and purporting to be the certificate of the governor, of naturalization of Samuel J. Hensley, as a citizen of Mexico, is a genuine paper, and the signature of Man'l Micheltorena to said paper is his true signature. The commissioner has offered his initials to said paper, and marked it as follows, J. W. No. 1.

I have also compared said paper with document marked Exhibit C, on the files in this case, and I find the said Exhibit C to be a true copy in the Spanish language, and the translations of the same into English to be substantially correct.

I further state that an original paper, purporting to be the original of paper marked Exhibit A in said cause, which is now shown me, is a genuine paper, and the signature of Gov. Man'l Mecheltorena, Sec'y Man'l Jimeno, the signature of Samuel J. Hensley, and my own signature, where they occur on said paper, are all genuine signatures of those several papers.

The last paper attached to said Exhibit A, marked by the commissioner as follows, J. W., I have carefully examined, and I state that I gave a copy of the original paper, which I had received from

Gov. Mecheltorena, to Samuel J. Hensley, as security, for the land he claims, until such time as he could perfect his title to the same according to the forms required. I gave that copy to S. J. Hensley, about the 20th of April, A. D. 1845.

The map which attached to the original paper, marked J. W. No. 2, is an original, of which a copy is attached to Exhibit A in this case.

I was military commander of the northern frontier, and exercised civil jurisdiction in all the northeastern portion of the territory of Upper California in the years 1844 and 1845. I knew the rancho Aguas Nievas claimed by Samuel J. Hensley, and the same was within my jurisdiction. It is on Butte creek, in the Sacramento valley, about one hundred miles north of Sutter's fort. Mr. Hensley applied to me, in the spring of 1845, to be put in juridical possession of the rancho Agune Nieves. I did not give him juridical possession of the same as he requested, for the reason that I was engaged in a military campaign with Gov. Mecheltorena, from January, 1845, to the 1st of April, 1845. Immediately on my return from said campaign, I had to go out again on an Indian campaign. Soon after my return from the said Indian campaign, Col. Fremont came, with his party, into that section of the Territory, and a general revolution followed throughout California.

I soon ceased to exercise military command or civil jurisdiction. For these reasons, I could not comply with his request.

Upon examination of the witness by G. W. Cooley, esq., land agent of the United States, the witness says, that his civil jurisdiction extended from the San Joaquin, northwest, over the whole Sacramento valley.

J. A. SUTTER.

The land agent, G. W. Cooley, esq., objects generally to the foregoing deposition as incompetent, reserving generally all legal objections.

May 13, 1853.

Subscribed and sworn to before me.

JAMES WILSON,
Commissioner.

Filed in office May 13, 1852.

GEO. FISHER, *Sec'y.*

I, George Fisher, secretary to the U. S. land commission to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a true, full, and correct copy of a deposition in case No. 201, wherein Samuel J. Hensley is claimant against the United States for the place named "Aguas Nieves," now on file in this case.

In testimony whereof, I have hereunto subscribed my name offi-

cially at office, in the city of San Francisco, California, this seventeenth day of February, A. D. 1855.

GEO. FISHER, *Sec'y.*

Filed in office Feb'y 17, 1855.

GEO. FISHER, *Sec'y.*

Doc. H. Hall and J. W., proved by Sutter and D. Bidwell, and annexed to the deposition of the latter before Com'r Hall, in 201.

This original exhibited by Capt. Sutter and proved before me. May 13, 1852. J. W.

Manuel Micheltorena, de Brigada del Ejercito Mejicano, Ayudante G'ral de la Plana Mayor del mismo, Gobernador Comand'te General é Ynspector de Californias.

[L. S.]

[L. S.] No pudiendo ahora por estar sumamente ocupado este gobierno supremo departamental, estender uno por uno los titulos respectivos a todos los ciudadanos que han solicitado terrenos con informe a su favor del Sor. D. Augusto Sutter, capitan y juez encargado de la jurisdicion de Nueva Elvecia y Sacramento, á nombre de la nacion Mejicano les confiero por estras letras la propiedad para ellos, y sus familias de los respectivos terrenos marcados en sus instancias y diseños a todos, y a cada uno de los que hayan solicitado, y obtenido informe favorable del espesado Sor. Sutter h'ta hoy dia de la f'ha, sin que; nadie pueda desputarles su propiedad serviendoles una copia de este que los dará mas adelanti el S. Sutter, de titulo formal con el que se presentaran a este gobierno para estenderles el mismo titulo en la debida forma y papel sellado correspondiente, y para la debido constancia en todos tiempos doy este documento que se reconocido, y acatado por todas las autoridades civiles, y militares de la nacion Mejicana en este y en los demas departamentos, autorizado debidamente con los sellos militar y de gobierno en Monterey, a veinte y dos de Diciembre de mil ochocientos cuarenta y cuatro.

MAN'L MICHELTORENA.

STATE OF CALIFORNIA,
Sacramento County, ss.

On this 28th day of June, A. D. 1850, I, Lewis A. Birdsall, hereby certify that John Birdsall, Samuel J. Hensley, George McKinstry, and Isaac J. Mott severally came before me, and being duly sworn by me, and being all creditable witnesses, depose and say, on oath, that they know Micheltorena, the above named grantor, and are well acquainted with his written signature, having seen him write, and that they verily believe that he signed the above with his own hand.

In witness whereof, I, Lewis A. Birdsall, recorder in and for

the county of Sacramento and State of California aforesaid, have set my hand and seal, the day and year above written.

L. A. BIRDSALL,
Recorder Sac. Co., California.

H. E. Robinson. Filed for record, June 28th, 1850, at 10 o'clock a. m., and duly recorded in Book D of deeds, page 140.

LEWIS A. BIRDSALL,
Recorder Sac. Co., California.
Per H. J. MAY, *Deputy.*

John Birdsall. This paper proved by the testimony of John Birdsall, before me, April 16, 1852.

H. HALL, *Com'r.*

No. 201. Samuel J. Hensley—Aguas Nieves. Doc. H. Hall and J. W., proved by Sutter, D. Bidwell, and annexed to the deposition of the latter before Com'r Hall.

Filed in office January 28, 1853.

GEO. FISHER, *Sec'y.*

In case No. 235, Exhibit 1 to deposition of John A. Sutter—P. L. Recorded in Record of Evidence, vol. 6, pages 289, 290.

I, George Fisher, secretary of the U. S. land commission to ascertain and settle private land claims for the State of California, hereby certify the foregoing to be a full, true, and correct copy of a paper marked Doc. H. Hall and J. W., annexed to the deposition of John Bidwell in case No. 201, Samuel J. Hensley vs. The United States, for the place named Aguas Nieves, now on file in this office.

In testimony whereof, I have hereunto signed my name, at office at the city of San Francisco, Cal'a, this 16th day of February, A. D. 1855. GEO. FISHER, *Sec'y.*

Filed in office February 17, 1855.

GEO. FISHER, *Sec'y.*

Doc. "H. H. and J. W."—Translation.

Manuel Micheltorena, General of Brigade of the Mexican Army, Adjutant General of the Staff thereof, Commandant General and Inspector of the Department of the Californias.

This supreme government of the department not being able at the present time, on account of being closely occupied, to extend one by one the respective titles to all the citizens who have petitioned for lands, with favorable reports from Señor Don Augustus Sutter, captain, and juez in charge of the jurisdiction of the New Helvetie and Sacramento, by these letters, in the name of the Mexican nation, I grant unto them and their families the lands described in their petitions and diseños, to all and each one of them who has solicited and obtained from said Señor Sutter, up to the

day of this date, favorable reports, without any one being able to dispute their ownership; a copy of this given to them hereafter by said Señor Sutter, serving them as a formal title with which they shall present themselves to this government for the purpose of delivering to them the said title in due form and upon paper of the corresponding seal; and for the due testimony thereof at all times, I give this present document, which shall be acknowledged and respected by all the civil and military authorities of the Mexican nation, in this and all the other departments. Duly authenticated under the military and governmental seals at Monterey, on the twenty-second day of December, one thousand eight hundred and forty-four.

(Signed) MAN'L MICHELTORENA.

I, George Fisher, secretary to the U. S. land commission to ascertain and settle private land claims in the State of California, hereby certify the foregoing to be a true and correct translation of a paper marked Doc. H. Hall and J. W., annexed to the deposition of John Bidwell in case No. 201, Samuel J. Hensley vs. The United States, for the place named "Aguas Nieves," now on file in this office.

In testimony whereof, I have hereunto signed my name at office at the city of San Francisco, Cal'a, this 16th day of February, A. D. 1855.

GEO. FISHER, *Sec'y.*

Filed in office Feb. 17, 1855.

GEO. FISHER, *Sec'y.*

Stipulation.

U. S. Land Commission, &c.

JOHN ROSE et al.
vs.
THE UNITED STATES. } No. 605.—Stipulation.

It is hereby stipulated that a certified copy of the document called the General Title, executed by Gov. Micheltorena, delivered to Capt. John A. Sutter, the original of which is on file in the case of Samuel J. Hensley vs. The United States, No. 201, as an exhibit to the deposition of John A. Sutter, be, together with a copy of the said deposition, filed and considered as evidence in this case.

Feb'y 16, 1855.

LOUIS BLANDING,
Asso. Law Agent.

Filed in office Feb. 17, 1855.

GEO. FISHER, *Sec'y.*

Recorded in Journal, vol. 4, p. 210.

GEO. FISHER, *Sec'y.*

[*Here follows map—original, page* 25.]

Affidavit of John Rose.

JOHN ROSE et al.
vs.
THE UNITED STATES. } No. 605.

This day personally appeared before me the said John Rose, and made oath that the original title papers to the land claimed in this case, consisting of the original petition to Gov. Micheltorena, the favorable report of Gen'l Sutter, and the decree of the said governor, together with a copy of the general title of said Micheltorena delivered by Gen'l Sutter to the original grantee of this land in accordance to the provisions of said general title, were accidentally and irrecoverably lost by John Smith while crossing the Sacramento or Feather river.

And this affiant further states, that the subsequent petition of Gen'l Sutter praying for another copy of said general title, and the copy thereof given in accordance with said petition, he believes to be hopelessly lost; that he has made the most diligent search and inquiry for them in every place where they might reasonably be expected to be found, and of every person who might probably know anything of them, but without success, and that they are hopelessly lost.

(Signed) JOHN ROSE.

Subscribed and sworn to before me on this 22d day of January, A. D. 1855.

PETER LOTT, *Commissioner.*

Filed in office February 1, 1855.

GEO. FISHER, *Sec'y.*

Recorded in Ev. B, vol. 11, p. 312.

GEO. FISHER, *Sec'y.*

B.—*Transfer.*

Know all men by these presents, that whereas, in the year 1848, I sold and transferred to Michael C. Nye and William Foster all my right, title, and interest, and claim to the following real estate, situate in Yuba county, California, to wit: six leagues of land, bounded on the northern side by the Yuba river, on the western side by the eastern boundary of John A. Sutter's land, on the southern side by Johnson's rancho, and extending easterly for quantity so as to make up the said six leagues; and whereas the said Nye and Foster have since sold said land to John Rose and George Kinlock: Now, *there*, in consideration of the premises, and further, in consideration of the sum of five dollars to me in hand paid by the said Rose and Kinlock, the receipt of which is hereby acknowledged, I hereby convey and quit-claim to the said Rose and Kinlock, their heirs and assigns, forever, all my right, title, in-

terest, and claim to the said lands, and every part and parcel thereof both in law and equity, and all right to the benefit of all grants to me heretofore made, and all equities in said land by me at any time heretofore held.

Witness my hand and seal this 12th day of August, A. D. 1852.

JOHN SMITH. [SEAL.]

Attest: F. HALSEY.

District Court.

STATE OF CALIFORNIA,
County of Yuba.

On this 12th day of August, A. D. 1852, personally appeared before me, Charles Lindley, clerk of the district court in and for the county aforesaid, Jno. Smith, to me known to be the person who made and executed the foregoing conveyance, and who to me acknowledged that he made and executed the same freely and voluntarily for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed the [L. S.] seal of said court this twelfth day of August, A. D. 1852.

CHAS. LINDLEY, *Cl'k Dist. Court.*
Per F. K. BECKLET, *Dep'ty.*

Endorsed:

Received for record this 15th Sept., 1852, at 45 minutes after three o'clock p. m., and recorded Oct. 5, '52, at 10 o'clock a. m., book 6, pages 201, 202.

CHAS. LINDLEY, *Recorder.*
Per F. K. BECKLET, *Deputy.*

Filed in office Feb'y 19, 1852.

GEO. FISHER, *Sec'y.*

Certificate.

STATE OF CALIFORNIA,
Sacramento County, ss.

On this 28th day of June, A. D. 1850, I, Lewis A. Birdsall, hereby certify that John Bidwell, Samuel J. Hensley, George McKinstry, and Isaac F. Mott, severally came before me, and being duly sworn by me, and being all creditable witness, depose and say, on oath, that they knew Micheltorena, the above named grantor, and are well acquainted with his written signature, having seen him write, and that they verily believe that he signed the above with his own hand.

In witness whereof I, Lewis A. Birdsall, recorder in and for the

county of Sacramento and State of California aforesaid, have set my hand and seal the day and year above written.

L. A. BIRDSALL,
Recorder Sac. Co., Cal.

H. E. ROBINSON.

Filed for record June 28th, 1850, at 10 o'c. a. m., and duly recorded in book D of Deeds, at page 140.

LEWIS A. BIRDSALL,
Recorder Sac. Co., Cal.
Per THS. J. ALY,
Deputy.

John Bidwell. This paper proved by the testimony of John Bidwell before me, April 16, 1852.

H. HALL, *Com'r.*

No. 201. Samuel J. Hensley. Aguas Neives. Doc. H. Hall and J. W., proved by Sutter and Bidwell and annexed to the deposition of the latter, before Com'r Hall. Filed in office January 28, 1853. Geo. Fisher, sec'y. In case No. 235, exhibited to deposition of John A. Sutter. P. L. Recorded in Records of Evidence, vol. 6, pages 289, 290.

I, George Fisher, secretary to the U. S. land commission to ascertain and settle private land claims in the State of California, hereby certify the foregoing to be a full, true, and correct copy of a paper marked "Doc. H. Hall and J. W.," annexed to the deposition of John Bidwell, in case No. 201, Samuel J. Hensley vs. The United States, for the place named "Aguas Nieves," now on file in this office.

In testimony whereof I have hereunto signed my name at office, at the city of San Francisco, Cal., this 16th day of Feb., 1855.

GEO. FISHER, *Sec'y.*

Filed in office Febr. 17, 1855.

GEO. FISHER, *Sec'y.*

Opinion of the Board.

JOHN ROSE and GEORGE KIMBALL vs. THE UNITED STATES. } Number 605.—For six leagues of land in Yuba county.

This claim is based upon what is called the general title, issued by Governor Micheltorena on the 22d day of December, 1844, and for the grantee, one John Smith, and which general title is filed in case No. 201, and which has been deemed valid in said case; and by written stipulation on file in this case the document above referred to is made evidence in this case.

The fact is fully established by the testimony of John A. Sutter and Mr. Bidwell that the said John Smith was one of the persons included in said general grant; and Gen'l Sutter testifies that he delivered a copy of the original grant to the said Smith, together with the map accompanying the original espediente. And it is also satisfactorily proven that the said copy and the map was lost by the said Smith while fording a river, which is supplied by a copy of the same, adopted by agreement of parties.

The testimony of Sutter and Bidwell also establishes the performance of the conditions of the grant.

It also appears that the said Smith sold verbally the claim to one Michael Nye and William Foster, and that Nye and Foster sold to the present claimants; and that by agreement of parties the said John Smith, on the 12th day of August, 1852, executed a deed to the premises to the present claimants, which said deed is offered in evidence and duly authenticated.

We are of the opinion, from the survey in the case, that the said Smith was one of the persons included in the general grant, and that the present claimants are entitled to a confirmation of the land above claimed, and a decree will be entered accordingly.

(Confirmed.)

Filed in office May 22d, 1855.

(Signed) GEO. FISHER, *Secretary.*

Recorded in record of decisions, vol. 2, p. 697.

(Signed) GEO. FISHER, *Secretary.*

Decree of Confirmation.

JOHN ROSE AND GEORGE KINLOCK vs. THE UNITED STATES. } No. 605.

In this case, after hearing the proofs and allegations, it is adjudged by the commission, that the claim of the said petitioners is valid; and it is therefore decreed, that their application for a confirmation thereof be allowed.

The land of which confirmation is hereby given is situate in the county of Yuba, embracing six square leagues, and is bounded as follows, to wit: on the north by Yuba river; on the west by lands of John A. Sutter; on the south by the lands of Johnson's rancho; reference being had to the deposition of John A. Sutter, on file in this case, for further particulars.

(Signed) R. AUG. THOMPSON,
S. B. FARWELL,
Commissioners.

Filed in office May 22d, 1855.

(Signed) GEO. FISHER, *Secretary.*

Recorded in record of decisions, vol. 2, p. 689.

(Signed) GEO. FISHER, *Secretary.*

Order of Transfer.

And it appearing, to the satisfaction of the board, that the land hereby adjudicated is situated in the northern district of California, it is hereby ordered, that two transcripts of the proceedings and of the decision in this case, and of the papers and evidence upon which the same are founded, be made out and duly certified by the secretary; one of which transcripts shall be filed with the clerk of the United States district court for the northern district of California, and the other be transmitted to the Attorney General of the United States.

Certificate of Transfer.

OFFICE OF THE BOARD OF COMMISSIONERS
To ascertain and settle the private land claims in the State of Cal'a.

I, George Fisher, secretary to the board of commissioners to ascertain and settle the private land claims in the State of California, do hereby certify the foregoing forty pages, numbered from 1 to 40, both inclusive, to contain a true, correct, and full transcript of the record of the proceedings and of the decision of the said board, of the documentary evidence and of the testimony of the witnesses, upon which the same is founded, on file in this office, in case No. 605 on the docket of the said board, wherein John Rose et al. are the claimants against the United States for six square leagues of land in Yuba county.

In testimony whereof I have hereunto set my hand and affixed my private seal, (not having a seal of office,) at San [L. S.] Francisco, California, this twentieth day of October, A. D. 1855, and of the independence of the United States of America the eightieth.

(Signed) GEO. FISHER, *Sec'y.*

(Transcript enclosed.)

Filed October 23, 1855. JOHN A. MONROE, *Clerk.*

Notice of Appeal.

OFFICE OF THE ATTORNEY GENERAL OF THE UNITED STATES, *Washington*, 3 *December*, 1855.

605.—"Six square leagues of land in Yuba county," John Rose et al., claimants.

You will please take notice, that in the above case, decided by the commissioners to ascertain and settle the private land claims in the State of California in favor of the claimants, and a transcript of the proceedings in which was received in this office on the 20th day of November, 1855, the appeal in the district court of the United

States for the northern district of California will be prosecuted by the United States.

C. CUSHING, *Attorney General.*

Endorsed: Filed February 11, 1856.
JOHN A. MONROE.
By W. H. CHEVERS, *Deputy.*

Petition of U. S. Dist. Att'y.

To the honorable District Court of the United States in and for the northern district of California:

THE UNITED STATES, Appellants,
vs.
JOHN ROSE et al., Appellees.

The petition of the United States, by their attorney, represents, that this cause is an application for a review of the decision of the board of commissioners, whereby the claim of the said appellee was confirmed, as appears by reference to the records in the case; that a transcript of the said records was filed in this court on the 23d day of October, 1855; that a notice of appeal was filed on the 11 day of February, 1856, and that the land claimed lies in the said district; that the said claim is invalid; wherefore appellants pray that the said decision of the board be reversed, and that this court decree the said title to be invalid.

Respectfully, &c.,
S. W. INGE, *U. S. Dist. Att'y.*

Endorsed: Filed February 25, 1856.
JOHN A. MONROE, *Clerk.*
Per W. H. CHEVERS, *Deputy.*

Answer.

In District Court U. S., northern district.

JOHN ROSE et al.
vs.
THE UNITED STATES. } No. 312.

For answer to the petition filed in this case on the part of the United States, the said appellees answer and say, it is true that the land described in the said transcript of the record of the proceedings and decision of the board of land commissioners to ascertain and settle private land claims in California lies in the northern district of California, and within the jurisdiction of this court.

But they deny that their title to the same is invalid, and aver that the same is valid, and pray *that* this hon. court, that the decree of said board of commissioners confirming their claim may be

affirmed, and the validity of their claim and title to said land may be decreed.

THORNTON, WILLIAMS & THORNTON,
For Appellees.

Endorsed: Filed February 25th, 1856.
JOHN A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Affidavit of H. S. Foote, on motion to open decree.

UNITED STATES OF AMERICA.

In the District Court of the United States for the northern district of California.

THE UNITED STATES
vs.
JOHN ROSE et al.

NORTHERN DISTRICT OF CALIFORNIA, *ss.*

On this day personally appeared H. S. Foote, of said district, who maketh oath and saith, that the above entitled cause was submitted to this court on the day of March, A. D. 1857; that said cause, as he is informed and believes, was submitted on motion of the district attorney of the United States for said district, upon the record or transcript of the proceedings therein before the hon. the board of United States land commissioners for California, before whom the claim of the said appellees was examined, and by whom it was confirmed; that said cause was submitted to this court, as deponent is informed and believes, without argument and without any opposition to its confirmation, and without the adduction of any testimony other than what appears in said transcript, before this court; that no decree of confirmation of said claim, as he is informed and believes, has yet been entered.

Deponent further saith, that after the said cause came to this court on appeal, he was employed to oppose the confirmation of the claim of said appellees by Robert M. Turner, for himself and others who are residents upon land which it is claimed by said appellees is within the boundaries of their said claim, and who, as deponent is informed and believes, settled upon said land in good faith for agricultural purposes, believing it to be public land of the United States, and, as deponent is informed and believes, have put upon said land valuable improvements; that after the employment of deponent as aforesaid, he called upon Andrew Glassell, esq., who then had charge, on behalf of the United States, of this appeal, as the assistant of the Hon. S. W. Inge, then district attorney of the United States for said district, and asked the consent of the said Andrew Glassell to appear with him and assist in the prosecution of said appeal, and to bring forward and examine on

behalf of the United States any witnesses whose testimony might be deemed material in opposing the said confirmation, and to adduce such other material testimony as might be procured, in opposition thereto; that said Andrew Glassell consented to the appearance of deponent with him in behalf of the United States, and agreed not to call up said cause without notifying deponent thereof in sufficient time to enable him to procure and adduce said testimony, or to give him an opportunity, in conjunction with the said Andrew Glassell, of presenting such opposition to said claim as might be deemed expedient; that when the term of the employment of the said Andrew Glassell on behalf of the United States expired, the said Andrew Glassell, as deponent is informed and believes, failed to inform the present district attorney of said arrangement with deponent; that deponent, upon obtaining the consent of the said Andrew Glassell, conferred with John J. Williams, esq., of counsel for the said appellees, informing him of said employment and of the said consent of the said Andrew Glassel, and made an agreement with the said John J. Williams, which deponent understood to be that said cause would not be called up or submitted by said Williams without advising deponent thereof, or giving him an opportunity to be present in court at the time; that deponent then supposed that there would be no difficulty in fixing said cause for hearing at such time as would enable him to advise his clients thereof, and to procure such testimony as he might wish to introduce; that he is informed and believes that it was then the practice of this court to fix cases for hearing upon the agreement of parties, or upon the application of either party, showing a proper cause therefor; that deponent was not aware that said cause would be called for hearing at the time it was called—on the contrary, he supposed, from the mass of business which preceded it, the cause would not be reached, if called regularly in the calendar, for some weeks thereafter; that the late summary disposal of cases of this class by this court, and the disposal of numerous appeals by the Attorney General of the United States, have brought this cause to a hearing by a call of the calendar at a period much earlier than deponent anticipated; that he had no knowledge or notice of the calling of said cause, or that the same had been called, until after the said cause was submitted as aforesaid; that said cause was called by the court and submitted by the district attorney, as deponent is informed and believes, without any action on the part of the said John J. Williams, or any other counsel, on behalf of said appellees; that deponent desires, with the consent of the district attorney, to argue said cause to the court, and would have done so when the said cause was submitted, if the court would not have allowed a postponement thereof for the purpose of taking further testimony—believing the same not to be entitled to confirmation by this court upon the record as it now stands on appeal, even without the adduction of other testimony.

Deponent further saith, that the witnesses whom he desires to examine, as he is informed and believes, reside, and have from the time of his employment resided, in Yuba and Sutter counties, in this State.

Deponent further saith, that although he was informed by the said Robert M. Turner, for himself and others, of certain facts and circumstances which, if presented to the court by testimony, would, in the opinion of deponent, have an important bearing against the said claim, he found it difficult to ascertain by whom and in what manner such facts and circumstances might be presented, in conformity to the rules of evidence governing the introduction of testimony in this court; that it was not until some time in the early part of February last past that he received a letter from the Hon. Charles H. Bryan, of Maysville, who is a practitioner of law there, to the effect that he, the said Bryan, was engaged in certain litigations at Maysville, in a position adverse to the claim of the appellees to title to the land in controversy in this cause; and that, having heard that deponent had been employed to oppose the confirmation of the said claim, he desired to put deponent in possession of certain facts in connection therewith which might be material in opposing the confirmation thereof, and which were substantially then set forth in the accompanying papers, numbered (1) and (2,) here referred to, and made part of this affidavit. That soon after the receipt of said letter, he wrote to the said Robert M. Turner, advising him of the receipt and contents of said letter, and advising the employment by him of Mr. Bryan in conjunction with deponent, and calling his attention thereto; but not anticipating the call of said cause at so early a period, he did not inform his said clients that it would be necessary for them to make immediate preparation for the trial thereof; that Mr. Bryan, in his letter to deponent, did not state by whom or in what manner the facts he mentioned could be established, except that he had elicited them in the said litigation, in the examination of the said John Rose, one of the claimants herein; that since the submission of said cause, deponent has received the accompanying affidavits, marked (1) and (2;) that deponent, upon the receipt of said affidavits, for the first time learned that he could establish the facts therein set forth by other persons than the said John Rose.

Deponent further saith, that if the said cause be reinstated and opened for further testimony, he expects to establish the facts set forth and contained in the accompanying affidavits, which are here referred to, and made part of this affidavit; that he is desirous of examining John A. Sutter and other witnesses who were examined on behalf of the claimants before the said board, believing that if the testimony of said witnesses be again taken in some material statements made before the said board, *and* that their testimony will not be found of a character sufficiently accurate or certain to war-

rant the confirmation of said claim, and that said claim is in its character fraudulent as against the United States.

Deponent further saith, that the claim of the appellees, if confirmed, he is informed and believes, will be of immense value; that it will cover large bodies of agricultural and mining lands, considerable portions of which are now occupied and improved, as deponent is informed and believes, under the belief that the same was public land of the United States.

Deponent further saith, if said cause be reinstated and opened as aforesaid, he expects to be able to procure all the testimony which he desires to introduce within two weeks from this date, and to be prepared then to argue and submit the cause.

Deponent further saith, that this affidavit is not made for delay, but for the purposes of substantial justice.

(Signed) H. S. FOOTE.

Sworn and subscribed before me this 17th day of March, 1857.

Endorsed: Filed March 17, 1857.

JOHN A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Order.

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco on Thursday, the 19th day of March, in the year of our Lord one thousand eight hundred and fifty-seven.

Present, the Honorable Ogden Hoffman, district judge.

THE UNITED STATES vs. JOHN ROSE et al. } D. C. 312. L. C. 605.

It appearing that this case has been heretofore heard and decided, on motion of the district attorney, the counsel for the appellees having been heard in opposition—

It is ordered by the court that this case be re-opened for the admission of new testimony; that such testimony be closed by Monday, the 30th March instant, and that this case be again submitted on that day.

Endorsed: Filed March 19, 1857.

JOHN A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Deposition of Michael C. Nye.

United States District Court, northern district of California.

SAN FRANCISCO, *March* 26, 1857.

On this day before Cutler McAllister, a commissioner of the

United States for the northern district of California, duly authorized to administer oaths, &c., &c., came Michael C. Nye, a witness produced on behalf of the United States in case No. 312, being an appeal from the board of commissioners to ascertain and settle the private land claims in the State of California, in case No. 605 on the docket of the said board of commissioners, and was duly sworn, and testified as follows.

Present, Gov. Foote for the U. S. dist. att'y; Thornton, Williams and Thornton, for claimants.

Questions by U. S. Dist. Attorney.

I am a resident of Yuba county; I have been in this country since 1842, off and on; I knew John Smith in this county; I have been acquainted with him since the summer of 1842; when I first knew him, he resided at Sacramento fort, at that time called New Helvetia; that was the residence of Gen'l Sutter at that time; I had no particular connection at that time *by* John Smith, I mean the claimant in this case, in 1844 or 1845; I could not say when I first became connected with him in business; we were in partnership; we had stock up in that county; there was an *adoble* house erected about two miles from the junction of the Yuba river, on its banks, by said Smith; that adobe house was below the Linda town, several miles to the west of it; the land on which this house was situated was a piece of land he had purchased from John A. Sutter; this house was an adobe house; I know that Sutter claimed this land, and sold or leased it to Smith, who built this house upon it and afterwards sold it to Sutter.

(So much of the above objected to as relates to the claim of Sutter, or sales made by or to him, as being hearsay and seensay evidence.)

Smith resided in that county from the year 1842 or 1843 up to the time of his building the said house; he worked down here, but had his residence, home, and property up there; for a short time he was on this tract of land, and afterwards built another place; In 1846, or 1846, he built a mud and stick house; it was built several hundred yards above Linda ferry, as it is now called, upon land which he purchased of Sutter at that time as a part of his grant; I know of no other houses but these two erected by Smith while he lived in the county of Yuba; I don't know how he recognised them, but I know that he purchased them of Sutter; I don't know what his opinion was as to whether he was on Sutter's land or not, as the line had not been run at that time; I have heard him speak about those purchases; he told me he had purchased those tracts of Sutter.

Question. Look at the description of the tract of land claimed in this case in the deposition of John A. Sutter, contained in the record on file in this cause, and state whether the adobe house, be-

fore mentioned in your deposition, was within or without said boundaries, as specified in said deposition.

Answer. I can't say, because I don't know; I don't know anything about the boundaries.

Question. Do you know of an adobe house which Smith built or had at that time, included within the boundaries of the grant which is now the subject of controversy?

Answer. Not any, according to the map which was shown to me to-day—according to my knowledge; the map which I refer to is a map shown to me to-day by Mr. Turner, which purports to be a plan or preliminary survey of New Helvetia, confirmed to John A. Sutter by the U. S. board of land commissioners, as surveyed by A. W. Von Schmidt, U. S. deputy surveyor, made in May, 1856.

(Answer objected to as being irrelevant and incompetent testimony.)

This map, to which I refer, is now before me.

(Att'y for claimants objects to any testimony upon or in regard to said map, no proper foundation having been laid for it.)

Ques. Suppose Sutter's line to be established or run three leagues to the east of the Feather river, where then would the adobe house be; would it be on the claim or outside?

(Question objected to as being irrelevant and incompetent, and as assuming a fact.)

Ans. It would be outside of the Smith grant several miles, and inside of Smith's claim; the stick house would be a mile, more or less, outside of the Smith grant; it might be more—I could not say.

Ques. Reflect upon the geography of that neighborhood, and say how far the stick house is outside of the Smith grant or below the western line of the Smith grant.

(Question objected to as irrelevant and incompetent.)

Answer. I should judge it was certainly a mile—it may be something more; I could not say positively what the distance was, as I have not been over that country for some years.

Ques. In what relation were you living with Smith at the time of his residence in Yuba county?

Ans. I was a partner with him in stock operations.

Ques. When did Smith leave that part of the country last?

Ans. He left that neighborhood in the summer or fall of 1848; he disposed of his whole interest to myself and Foster—land, stock, and everything; I bought of Smith the land he built the mud house on, and this grant he was supposed to have outside of the tract he purchased of Sutter and adjoining it; I purchased of him the league which he purchased and on which he built the stick house, and also a Mexican grant, which he had outside and adjoining that tract, which Mexican grant is the grant in question.

Ques. Were you or not familiarly acquainted with the business, interest, and property claims of Smith in that neighborhood?

(Objected to as irrelevant.)

Ans. I was a near neighbor*hood* of his, and saw him every day; I don't know of his building any house upon the said Mexican grant to my knowledge; I don't think I know of any improvement he made upon said tract whilst it was claimed by him; I think if any improvement had been made upon it I should have known it; at the time Smith left the Leinda ferry, I resided there in an adobe house; I built about 3 or 4 hundred yards from the said stick house that Smith built; I lived there for 4 or 5 months afterwards; during that period I travelled through the neighborhood in various directions, so that I could observe the condition of things; I had a good deal of stock running through the country; during the period of my residence at the ferry after Smith's departure, I saw no tracts of improvements made upon the land in controversy previous to Smith's departure; since Smith left there have been a great many improvements made upon that tract, but I do not know whether they were made by persons claiming under Smith or not.

Ques. Do you know of any of the claimants making any improvements on said tract of land since Smith left there?

Ans. I do not; I have not been there for several years.

Cross-examined.

I do not know the dividing line between Smith's purchase of Sutter and Smith's Mexican grant, except by reference to the map, which Mr. Turner *should* me this morning; Smith had cattle while he was there, and they roamed over and grazed on both tracts; I am the same witness who testified before the land commission.

Direct Examination resumed.

According to this map the heavy body of cattle ran most on Smith's grant towards the hills.

Ques. Do you know, of your knowledge, of Smith's cattle having been specially driven upon the land now in controversy more than upon any other lands immediately in the vicinity unenclosed?

Ans. The cattle were very seldom driven; when they were driven they were driven into a corral, or to what is called a rodeo ground; the corral was between a mile or half a mile above the Linda ferry—east of the ferry.

Under objection from U. S. dist. att'y as not being a direct answer to the last question, and being hearsay, the following addition to the answer is written down: "That when I purchased this land from Smith, Smith told me he had tried to accustom his cattle to range up in that country, supposed to be Smith's grant, there being water and grass there."

M. C. NYE.

Subscribed to and sworn before me this 26th day of March, 1857.

CUTLER McALLISTER,
U. S. Comm'r.

Deposition of John A. Sutter.

United States District Court, northern district of California.

SAN FRANCISCO, *March* 26, 1857.

On this day before Cutler McAllister, a commissioner of the United States for the northern district of California, duly authorized to administer oaths, &c., &c., came John A. Sutter, a witness produced on behalf of the United States in case No. 312, being an appeal from the board of commissioners to ascertain and settle the private land claims in the State of California, in case No. 605 on the docket of the said board of commissioners, and was duly sworn, and testified as follows.

Present, Gov. Foote for U. S dist. att'y; Thornton, Williams and Thornton, for claimants.

Questions by U. S. Dist. Att'y.

1 ques. In your deposition in this case heretofore given you have, in specifying the boundaries of the grant now in question, stated "that my line was established three leagues to the east of the Feather river;" you stated further, "it was not surveyed, but I claimed to that boundary, and it was respected and recognised as my boundary by Smith." Please look upon the map now presented to you, and state what map it is.

(Question objected to as irrelevant and incompetent testimony, and also objects to any testimony with regard to said map.)

Ans. This is a map made by the deputy U. S. surveyor, under the authority of the surveyor general, at my instance, and the instance of those interested in the various tracts described thereon.

Ques. 2. If your line extended three leagues to the east of Feather river as above stated, would or would not the improvements heretofore spoken of by you in the deposition already referred to, as having been made by Smith, the claimant, find their location within your own grant before any portion of the same was disposed of by you?

Ans. I came very seldom up there; if he had another house besides the one I bought back I don't know; that house stood upon my grant, but his cattle grazed on his own land.

Ques. 3. Are you prepared to say at this moment, according to all the information you now possess on this subject, whether or not Smith ever did build any house outside of the boundaries of the land sold by you to him, or, in other words, upon the land in question?

Ans. This I don't know, as I have not been there for a long time; I do not now recollect.

Ques. 4. Do you know this man Smith well, or not?

Ans. I know him well; he was either from Canada or New

Brunswick; he applied to me for a grant of land; I cannot recollect now the amount of land he applied for.

Ques. 5. What steps, if any, did he take towards obtaining a grant?

Ans. He took the usual steps; made a petition, accompanied with the map, which was sent to Monterey with my information that the land was unoccupied; I don't remember the date of this proceeding; the petition and the map was made by Major Bidwell, and sent to Monterey; I don't remember if Major Bidwell himself or somebody else took it to Monterey; the petition was sent from Monterey to me to give information about the land; I do not remember exactly, it is so long a time since; I don't remember what time the petition was received by me from Monterey; I don't think I could name the year; the petition was written in the usual form, the land described that he wanted; I don't recollect any more particulars with regard to the contents of the petition.

Ques. Could you now specify the boundaries of the land thus petitioned for?

Ans. I could not.

Ques. Could you now give a specific or particular description of the map to which you have referred?

Ans. No, I could not; it is so long a time since, that I cannot remember—it is impossible.

Ques. When the petition was received by you from Monterey, as you have described, what was your own action thereupon?

Ans. The first time when it came, I gave information in his favor—that is to say, that the land was not occupied; I did nothing more with it at that time; afterwards I gave him a copy of the general title, because he was entitled to it; I don't recollect the date when I gave him the copy of the title.

Ques. Do you know what became of Smith's papers?

Ans. Only what I heard from other persons.

Ques. Did you take any other official action with regard to this claim of Smith's than what you have stated?

Ans. None, except to give him possession; I authorized him by writing, as in most of the cases, to take possession; that is what I mean by giving possession.

Ques. At any subsequent period, at any time after this, did you have occasion to take any further official action with regard to this claim?

Objected to.

Ans. None at all.

Ques. You have spoken of the general title; do you recollect now the contents of that document, and can you now state them?

Ans. I do recollect it very well, but cannot now repeat it word for word.

Ques. Can you recite any part of the contents, word for word, either in Spanish or English?

Ans. That is impossible; I did not learn it by heart; I recollect the meaning of the document.

Ques. Are you prepared to say now, that the document you handed to Smith was an exact copy of the original?

Ans. It was. I wrote nearly all of them myself; Major Bidwell wrote only a few, which I signed. I wrote them in Spanish. I cannot remember whether I wrote this particular one; generally I compared them with the original. I do not recollect in this particular case whether I did so or not. I don't recollect if I handed this particular title to the claimant in this case personally, or sent it to him. Once I sold some land to Smith.

Cross-examined.

Ques. After Smith lost his papers, do you recollect whether or not you gave him another copy of the general title?

(Question objected to on the ground that it is not proved by this witness that he had any knowledge of the loss of the papers, except what he had heard from others, nor sufficiently proved by other witnesses in the case, and also on the ground that it is a direct leading question.)

Ans. I believe I did.

Ques. Do you consider the Von Schmidt survey, the map of which was shown you this morning, a correct survey of your lands?

(Objected to on the ground that it is not a question addressed to him as an expert in surveying, and because his opinion is not testimony in this case.)

Ans. The survey may be correct, but I have the right to alter the different locations, and shall do so.

Ques. In the final survey of your lands, should this survey be followed, would you not protest against it as incorrect, and unjust to you?

Ans. I would.

(Question and answer both objected to by U. S. dist. att'y.)

Direct Examination resumed.

Ques. You say you believe you gave Smith a second copy of the general title; when do you think you did so?

Ans. I cannot recollect when. I don't remember whether I gave it to him or sent it to him. I don't recollect whether any person was present when I did so.

Ques. On what ground do you protest against the survey?

Ans. Because the other parties persuaded the surveyor to do it as they wanted it.

Cross-examination resumed.

Ques. Did you not give the second copy of the general title to Smith, upon your hearing that he had lost his first?

Ans. I recollect now that the copy was called for, but I don't recollect by whom; it was at the time I heard he lost the papers.

Direct Examination re-resumed.

Ques. Did you give out the second copy upon simply hearing the first was lost; and do you know who told you so?

Ans. It was proved to me by many people who knew it, that the first was lost. I gave the second. I don't recollect who told me it was lost.

Ques. What do you mean by saying that the loss of this document was proved?

Ans. when a man like Bidwell told me anything, I believed it like the gospel.

J. A. SUTTER.

Sworn to and subscribed before me, this 26 day of March, 1857.

CUTLER McALLISTER,
U. S. Comm'r.

Endorsed: Filed March 30, 1857.

JOHN A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Deposition of L. Ransom.

United States District Court, northern district of California.

SAN FRANCISCO, *March* 28, 1857.

On this day before Cutler McAllister, a commissioner of the United States for the northern district of California, duly authorized to administer oaths, &c., &c., came Leander Ransom, a witness produced on behalf of the United States in case No. 312, being an appeal from the board of commissioners to ascertain and settle the private land claims in the State of California, in case No. 605 on the docket of the said board of commissioners, and was duly sworn and testified as follows.

Present Gov. Foote for U. S. dist. att'y.

J. S. Williams appeared for claimants and objected to the taking of this deposition, for want of sufficient notice.

Questions by U. S. Dist. Att'y.

I am chief clerk of the U. S. surveyor general's office for California.

Ques. Look at the map now handed to you, and state what it is.

(Question objected to as being irrelevant and *incompeat* testimony.)

Ans. I cannot answer this question more appropriately than in the language of the description of the map, as marked on its face in the following words: "Plat of Preliminary survey of New Helvetia, confirmed to John A. Sutter by the U. S. land commissioners, containing 182, 301, 784 acres, excess being 35, 825, 245, as surveyed by A. W. Von Schmidt, U. S. deputy surveyor. Scale 80 ch's to the inch.

Certificate of U. S. surveyor general, California.

(Signed) J. C. HAYS."

Ques. 2. Give the history of that map so far as you know it, and how it came to be made.

Ans. 2. I can state nothing more particularly than as it is laid down in the certificate of the surveyor general upon the face of it.

Ques. 3. Do you know anything as to the verity of the facts contained in this certificate?

Ans. 3. I know of the application of Gen'l Sutter for the survey; I know that Von Schmidt was appointed to make the survey, and I also know that instructions were given him to make the survey in accordance with the decision of the board of land commissioners made in this cause.

Att'y for the claimant protested against this deposition being either received or read, on the grounds aforementioned, and under this protest proceeds to the cross-examination.

Cross-examination.

Quest. 1. Were you present when this survey was made?

Ans. 1. I was not.

Ques. 2. Do you know of your own knowledge whether said survey is a correct and faithful survey of those lands?

Ans. 2. I know nothing of my own knowledge. I know that Von Schmidt received his instructions, and returned his field-notes under oath, and the map was made from those field-notes.

Ques. 3. Do you know of your own knowledge whether or not this map is made in strict accordance with said field-notes?

Ans. 3. I made a general examination of it, but cannot say of my own knowledge that every line or point of it is true.

Ques. 4. Have you ever read every word of those field-notes?

Ans. 4. I made but a general examination of them.

Ques. 5. Was the said Von Schmidt specially sworn to make this identical survey?

Ans. 5. My opinion is that he was, but I am not certain about it.

Ques. 6. Under authority of what law was this survey made?

Ans. 6. I don't know, precisely, what law; I could if I had the books, and under instructions contained in the title-book published by the land commissioners, which book contained part of the treaty

of 1848 with the Mexican government, the law of Congress, 1851, and the said instructions.

Ques. 7. Do you know whether this Sutter claim was confirmed at the time of the survery?

Ans. 7. It was by the board of land commissioners.

LEANDER RANSOM.

Sworn to and subscribed before me this 28 , 1857.

CUTLER McALLISTER,
U. S. Com'r.

Endorsed: Filed March 30, 1857.

JNO. A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Stipulation or Admission.

THE UNITED STATES
vs.
JOHN ROSE et al. } No. 312.

It is admitted in this case that John Smith has filed a bill in Yuba county to set aside his sale of the land in controversy to Nye and Foster.

JOHN ROSE.

Endorsed: Filed March 30, 1857.

JNO. A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Deposition of John Rose.

United States District Court, northern district of California.

SAN FRANCISCO, *March 31st*, 1857.

On this day before Cutler McAllister, a commissioner of the United States for the northern district of California, duly authorized to administer oaths, &c., &c., came John Rose, a witness produced on behalf of the United States in case No. 312, being an appeal from the board of commissioners to ascertain and settle the private land claims in the State of California, in case No. 605 on the docket of the said board of commissioners, and was duly sworn, and testified as follows.

Present, Thornton, Williams, and Thornton for clients; Gov. Foote for U. S. dist. att'y.

Questions by United States Dist. Att'y.

Ques. 1. Is this paper, marked Appendix A, a deposition formerly given by you before the referee named therein?

(Att'y for clients objects to the deposition referred to being put in evidence, on the ground of irrelevancy and incompetency.)

Ans. 1. I believe it to be my deposition referred to.

Ques. 2. Do you know the land upon which Smith first built a house; if so, where does that land lie?

Ans. 2. I know the land, and it lies on the Yuba river, now called Mineral ranch.

Ques. 3. Do you know the tract of land claimed by Gen'l Sutter in that neighborhood, called New Helvetia?

Ans. 3. I know the body of land so distinguished as *Settler's* grant.

Ques. 4. Suppose Sutter's grant to be established three leagues east of Feather river, how far would his eastern line be above Linda ferry?

Ans. 4. I should think about five miles.

Ques. 5. Where did Smith first settle in that neighborhood?

Ans. 5. Ques. withdrawn.

Ques. 6. Where was Smith residing when you first knew him; in what house?

Ans. 6. In a house between two and three hundred yards east of the ferry.

Ques. 7. Did Smith dispose of the house first built by him on the Murial ranch to Gen'l Sutter?

Ans. 7. I don't know, but I have heard Smith say he did.

Ques. 8. If so, when, and on what terms?

Question withdrawn.

Ques. 9. When did you hear Smith say that he sold that house to General Sutter?

Ans. 9. I don't remember; but he stated to me at some time that he once owned it and sold it to Sutter. (All evidence of Smith's declarations are objected to in this case, upon the ground that the same is hearsay, and upon the further ground that they appear to have been made after Smith sold his interest in said land.)

Ques. 10. Did he or not surrender the first house, or the house built on the Murial ranch, to Gen'l Sutter in consideration of Sutter's transferring to him the land upon which the Linda house was located—that is to say, the stick and mud house?

(Question objected to on the ground that the contract between Smith and Sutter is the best evidence of that, and for the further reason that such testimony is irrelevant to the issue upon which this examination was directed by the court to be had.)

Ans. 10. I did not so understand him; he told me that he had sold this place to Sutter out and out, with the intention of going to Oregon; he did not go, and afterwards purchased a portion of Sutter's land upon his eastern boundary; the deed will show that.

Ques. 11. How much land did he thus purchase on the eastern boundary, or what was the size of the tract, if you know?

(Objected to, because the deed is the best evidence of the fact.)

Ans. 11. Three square miles.

Ques. 12. How far is the eastern line of the Murial ranch above the house so called upon the same?

(Objected to as irrelevant.)

Ans. 12. I am not certain; I think about ¾ of a mile.

Ques. 13. How far is the eastern line of the tract of land that you describe as being three square miles, above the place called Linda ferry?

Ans. 13. About two and a half miles—somewhere about that.

Ques. 14. How far is the house made of stick and mud from Linda ferry?

Ans. 14. I answer again, between two and three hundred yards from the Linda ferry.

Ques. 15. Do you know of any house built by Smith, or built during his time, upon the grant of six leagues now in controversy?

Ans. 15. I do not.

Ques. 16. Do you know of any fruit-trees located there during his time?

Ans. 16. I do not.

(Att'y for claimants objects to their course of examination, because the case was not open for rebutting testimony, but expressly upon the subject of boundaries, by order of the court.)

Ques. 17. Do you know of any ditches located on that land?

Ans. 17. I do not.

(Gov. Foote, for the dist. att'y, in answer to the above objections, notifies the witness and his counsel that he will expect to examine said witness in open court next Saturday, and have him subpœnaed for that purpose, and demands that this notice be put down by the commissioner, in order to bring to the notice of the court.)

(Att'y for claimant objects to any such entry as above, this being neither the time nor the manner of answering such objections.)

Commissioner puts down the notice under above objection.

Ques. 18. Were there any improvements made upon the six leagues square by Smith?

Ans. 18. Not that I know of; there might have been a corral and I not known it, as it might have been burned up; there might have been other improvements.

Cross-examination.

Ques. 1. When did you first know the land claimed in this case?

Ans. 1. In the fall of 1848.

Ques. 2. Do not Smith's six-leagues grant and the three square miles purchased by Smith of Sutter adjoin?

Ans. 2. They do.

Ques. 3. Do you know the boundaries between those two tracts; and if so, how do you know them?

Ans. 3. I only know from parties having shown me some stakes, and said they were Sutter's eastern boundary; they told me they

saw the surveyor measuring the line and putting down the stakes, about six months ago, in surveying Sutter's ranch.

Ques. 4. Are not Smith's improvements, above referred to, certainly within either the said three-miles tract, or the said six leagues?

(Question objected to on the ground of its being leading.)

Ans. 4. They are.

Ques. 5. If the said boundary line should be finally run between the said improvements and the said six-leagues grant, according to the survey above referred to, in that event would not the said improvements be on the three-mile tract purchased by Smith of Sutter?

(Objected to as leading.)

Ans. 5. They would.

Ques. 6. Considering the said two tracts as one compact body of land, are the said improvements within or without said body of land?

(Question objected to as unduly hypothetical.)

Ans. 6. Certainly.

Ques. 7. Might not improvements, such as corrals, ditches, and fruit-trees, have been put upon the said six-leagues grant, and all traces of them have disappeared before you knew the land?

Ans. 7. There might have been corrals and peach-trees, but I think a ditch would have left a place.

JOHN ROSE.

Sworn and subscribed before me, this 31st March, 1857.

CUTLER McALLISTER,
U. S. Com'r.

Appendix A.—Affidavit of W. W. Smith.

STATE OF CALIFORNIA, *county of Yuba.*

W. Wileson Smith, being duly sworn, on oath says, that he is a notary public in and for Yuba county, and he was appointed a referee by the district court of the 10th judicial district, in and for the county of Yuba, State aforesaid, in a certain action pending in said court, wherein James Leurs et al. were plaintiffs, and C. G. Wilton et al. are defendants; that John Rose, with whom deponent has been acquainted for the last six years, was called a witness on the part of the plaintiff, and testified therein before me as such referee, and the following is a full, true, and correct copy of the testimony, as taken by me as such referee, and given by the said John Rose, under oath, as such witness, on the day of February, A. D. 1857; and that the said John Rose is the same identical person who now claims a grant of land from the Mexican government to one John Smith, the said land being situate in this

State, and in that portion of this State now known as the county of Yuba.

W. WILSON SMITH.

[L. S.] Sworn and subscribed before me, this 6th day of March, A. D. 1857.

W. B. LATHAM, JR.,
Notary Public, Yuba Co., Cal.

Deposition of John Rose.

Q. Are you acquainted with John Smith, who is mentioned in the deposition of John A. Sutter, which is referred to in the decree of confirmation, Exhibit No. 3?

A. I am.

Q. Did you ever receive any conveyance from that John Smith?

A. I did.

Q. Where is that conveyance?

A. In the office of the U. S. land commission in San Francisco.

Q. Are they filed in any case there?

A. It is, in the case of John Rose et al. vs. United States, land case before the commission.

Q. Have you made any attempts to get it from the files of the court?

A. I went to San Francisco about the middle of December in order to get the deed, expressly for that purpose; my lawyer went with me to the office of the clerk of the land commissioners, and the lawyer asked the clerk in my presence, who told me that I could not get it; he, the clerk, would allow it to leave the office.

Q. Is that deed in the possession of any of the plaintiffs, or under their control?

A. It is not.

Q. At the time that John Smith gave this deed to yourself and Kimlock, was he in possession of the premises?

A. No, it was in my possession.

Q. To what use did you subject it?

A. Used it principally for stock; at the time the deed was given, we used a portion of it as a farm; we were in the occupation of it.

Q. Are you acquainted with a tract of land that goes by the name of Johnson's ranch?

A. Yes.

Q. How far is the Yuba river from the boundary of Johnson's ranch?

A. About six miles, I think.

Q. Do you know the eastern boundary of the land of John A. Sutter?

A. Yes, I think I do.

Q. Do you know the land occupied by the plaintiffs, opposite Long Bar?

A. I do.

Q. How far is this land occupied by the plaintiff from the eastern line of Sutter's land, so called?

A. The house at Long Bar ferry is about three and a quarter miles from what is called the eastern boundary of Sutter's land.

Q. How far would six leagues carry the eastern line of the land specified in this decree of confirmation, Exhibit No. 3?

A. At least three miles above the house of plaintiffs.

Q. Is the land there occupied by the plaintiffs, and their house and garden and enclosures, embraced within the tract mentioned in this decree of confirmation, according to the number of leagues given in that decree?

A. To the best of my knowledge they are.

Q. You stated that the eastern line of the land mentioned in this decree of confirmation extended three miles above the house of the plaintiffs; please state how far south it extended, back of the river.

A. About six miles.

Cross-examination.

Q. Has there been an appeal of that case of Rose and Kimlock vs. The United States, from that commission to the United States district court?

A. Not that I know of; I have received no notice of appeal.

Q. Have your lawyers received any notice of appeal in that case, to your knowledge?

A. Not to my knowledge.

Q. When did you last see the lawyers that you employed before the land commission, in regard to that business?

A. I have not seen him in regard to that business since the confirmation.

Q. Have they informed you at any time since the confirmation, or any other counsel that you may have employed, that the case was appealed from the land commission to the United States district court?

A. I have received no notice.

Q. Where did you reside upon this land?

A. At various places. I resided some time at Linda—kept the ferry there; at another time, about one and a half miles below Linda; a portion of the time just outside the ferry. There are none of these places on the land of the John Smith grant.

Q. For what purpose and in what business did you use the land you got of Jack Smith?

A. For grazing cattle.

Q. Did you use for grain, grass, or hay, that portion of your pretended claim which is the subject of this suit?

A. Only by stock running on it; stock ran there in 1849, and before that, and in the spring of 1850.

Q. Is not the land in dispute among the mountains, near and contiguous and beyond mountains, going from your former residence?

A. It is among what is termed the foot-hills.

Q. How far is it from the ground in dispute, claimed by the defendants as mining ground—from Linda ferry, your former residence?

A. About five miles and a half to five and three-quarter miles by a direct line, a surveyor's line; to the best of my knowledge, five and a half miles.

Q. Is it not called ten miles?

A. No.

Q. How far is it from the last place you speak of to the ground in dispute?

A. About seven miles.

Q. Have you never heard from the parties interested in the Sutter grant that the line runs some miles below Linda, instead of within 3 or 4 miles of this ground?

A. No.

Q. Has the line of Sutter been surveyed between the Rose ranch and the Sutter grant?

A. I have been told that it was, and been shown the corner stake.

Q. Were you present at the survey?

A. No.

Q. When you speak, then, in your examination in chief, of the east line of Sutter's grant, do you speak of your own knowledge of the actual surveyed line?

A. No, I did not see the surveyors run the line, but the stakes were shown to me by others.

Q. Have you ever purchased any portion of the grant of Sutter adjoining your grant?

A. I have.

Q. From whom did you purchase?

A. From John A. Sutter, from Michael C. Nye, and Wm. Foster.

Q. Have you ever sold any land below Linda to Henry P. Hann?

A. I have.

Q. How far is that land below Linda?

A. About one and a half miles.

Q. Have you, before or since the sale to Hann, claimed the land you sold him as belonging to the Smith grant?

A. No.

Q. Have you, to James Simpson, Robert Turner, and others occupying lands below Linda, represented to them that those lands were upon the Jack Smith grant, at any time?

A. I have no recollection of making such a remark, nor do I think it possible I could ever have made such a remark.

Q. Have you ever stated in my office, in my presence and in the presence of W. B. Latham and Chas. E. Filkins, that you was uncertain as to where the boundary of the Smith grant or Rose's ranch terminated, in connection with those lands in dispute?

A. I don't remember ever having any conversation as to these mining lands. In a conversation with Mr. Bryan, in which my claim was maintained, the particulars of which I do not remember, he told me that this claim would be brought up in the trial of this case.

Q. I ask you, Mr. Rose, to think a moment, and refresh your memory, and see if you don't recall a conversation recently had in the office presence of Wm. Latham and Mr. Filkins, in the office of Bryan and Filkins, in which you stated in substance that you were not certain where your line did run in connection with the mining lands in dispute.

A. I don't remember any such conversation.

Q. Do you remember having any conversation within the last two months in the same office, and before the same persons, in relation to the upper boundary of the grant you claim?

A. I do not remember any particular conversation; I have been asked about my upper boundary by so many persons, at different times, that I don't charge my memory with any remarks on the subject.

Q. Have you executed any conveyance of the lands claimed by plaintiffs in this suit to these plaintiffs; and if so, when?

A. Yes; I made a deed a few days ago.

Q. How many days ago?

A. Two or three days ago; I don't remember the exact day.

Q. Was there any consideration paid to you, or on your behalf to any others, at the time or prior to the time of the execution of the deed mentioned?

A. There were two payments made to me on that acct., one of five hundred and ten dollars in May last, with the understanding that if they purchased the land that was to be the first payment.

Q. Has there ever been any other payment?

A. Of one hundred dollars the day the deed was executed, and the balance to be paid at such times as we agreed upon.

Q. Do you know whether your stock did not also range over hills, mountains, and valleys that did not belong to you?

A. I don't think they went much beyond what I claimed; they may, and they may not.

Q. Do you recollect ever finding your cattle on any hills except those in your claim?

A. Not the cattle you refer to.

Q. Is this country that you speak of, where these mining lands are situated, and was it at the time you spoke of in your former testimony, agricultural and grazing land?

A. It is agricultural and grazing land now; and I suppose if it is, it was.

Q. How many farms and gardens, after you pass the first foothills in going to the mining lands in dispute, do you know of being upon Jack Smith's grant as claimed?

A. I do not know how many.

Q. Is there a farm or garden within one mile of the ground in dispute, except that claimed by the plaintiff, on that side of the river?

A. I don't know whether there is or is not.

Q. Is there not a large population occupying the ground among the hills and ravines located on and in the neighborhood of the mining lands in dispute?

A. In those lands in dispute I see quite a number of persons—a number of Chinese were above them, and quite a number of Americans below it.

Q. Is there not a large mining population located upon that portion of this grant that you claim to be in the mountains, and are they not there for mining purposes, and not agricultural and grazing purposes?

A. There is a large population, and the majority for mining purposes, and two or three cultivating gardens.

Q. Has that land in the mountains spoken of in the neighborhood of the land in dispute, which you claim to be on the grant, been occupied ever since the settlement of California, and the discovery of gold by the Americans, by miners for gold, as mining land?

A. There have been miners on the land in the mountains on this claim since 1849—mining for gold.

Direct resumed.

Linda is not within what is termed the Jack Smith grant; the line of the grant commences about two and three-quarter miles above the Linda ferry. I know Mr. Mellon; Mr. Mellon applied to me to purchase a portion of the land in the enclosure of the plaintiffs in dispute; Mr. Mellon came to see me some time in December last, and we had a conversation about the land in the enclosure; as near as I remember, I told him I understood he wanted to purchase, and the particulars of the conversation I don't remember; he said he did; he went so far as to agree upon a price if he would take it; that is, I told him what I would take for it, and he said he would go and see if he would take it; the agreement was made with the plaintiff for the purchase of this land of theirs some time last May; at the time the first payment was made there was an agreement to purchase, which was not concluded.

Cross-ex.

I know of an old adobe house at Linda; M. C. Nye built and lived in it. Jack Smith lived in a house, in 1848, close to the ferry, two or three hundred yards from it.

Q. What passed at the conversation with Mellon?

A. I told Mr. Mellon that I had received some money from Mr. Myers on this land, one of the plaintiffs; that Mr. Meyers had the refusal of it; that I left myself at liberty to sell to any person if Mr. Meyers did not see proper to take it at the moment that I told him that I would sell; that if I sold to Mr. Mellon that I would have to pay Myers back with interest; I think it was probable I said that Meyers was indifferent to this purchase.

Q. Did not Jack Smith own land below this grant by purchase?

A. He did.

Endorsed: Filed April 1, 1857.

JNO. A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

THE UNITED STATES
vs.
JOHN ROSE et al.

The claim in this case is founded on what is known as the "General Title" of Micheltorrena. It has already, after full consideration, been determined in this court that that grant was sufficient to convey a valid title to those in whose favor it issued. The only points now open to controversy in this case are, therefore: first, whether the alleged grantee was one of those persons for whose benefit the grant was made; and secondly, has the right (if any) acquired by him been forfeited by such unreasonable neglect to perform the conditions of occupation and cultivation as to authorize the presumption that he had abandoned his land? First, was he one of the grantees under the original title? The grant of Micheltorena bears date Dec. 22d, 1844. It recites that the supreme government not being able, on account of other occupations, to extend one by one the respective titles to all the citizens who have petitioned for lands, with favorable reports from Señor Don A. Sutter, by these letters, grants unto them and their families the lands described in their petitions and diseños, to all and each one who has obtained the favorable report of Señor Sutter, without any one being able to question their ownership; a copy of this given to them hereafter by Señor Sutter serving them as a formal title, with which they shall present themselves to this government for the purpose of delivering to them the title in due form and upon paper of the corresponding seal; and for the testimony thereof at all times I give this present document, which shall be ack. and respected by all the civil and military authorities of the Mexican nation, in this and all the other departments.

(Signed) MICHELTORRENA.

It having been decided that this grant passed a title to the persons therein referred as fully and effectually as if they *had* individually named in it, or had received therein separate titles, the only question that remains is, was the claimant one of those who had petitioned the government, and had obtained a favorable report from Señor Sutter; of this the most satisfactory evidence would undoubtedly be the production of a copy of the grant delivered to him by Sutter in obedience to the direction contained in it. But this, though perhaps the best, is not the only evidence which could establish the fact that the claimant was one of the intended grantees. If he could show that he had petitioned for the land, and that he had obtained the favorable report of Gen. Sutter, it would clearly be enough to establish his right under the grant *was*, though Sutter may have neglected, or refused, to give him the evidence of his title which he was directed to furnish. The fact, however, that such a copy was not delivered to the party would be a circumstance requiring explanation; for it has not as yet been suggested to this court that Sutter neglected, or refused, to comply with the directions of the general title in this respect then applied to by any one entitled under it. In this case at bar, it is alleged that a copy of the title was duly given to the grantee; that it, with other papers, was lost by him while fording the Sacramento river; that on being made acquainted with the loss, Capt. Sutter furnished a second copy, which was sent by grantee to Monterey for the purpose of obtaining the approval of the assembly, but that he has never been able to recover it, or to discover what had been done with it. Gen. Sutter, who was sworn on the part of the claimants, testified that John Smith petitioned the governor for 6 square leagues of land, accompanying his petition by a map drawn, as he understood, by John Bidwell; the expediente, with the usual decree for information, was acted upon by the witness, and favorable report made before the 22d Dec., 1844. The witness also stated that he remembered having given to Smith a copy of the original title, as he was entitled to have it; that subsequently he was informed, and fully satisfied, that in the spring of 1845 Smith lost all his documentary evidence, or expediente, in this case. On his cross-examination he stated that after the petition came back from Monterey, for his report, he examined it in the presence of Bidwell, who wrote it, and of Smith, the grantee. Major Bidwell confirms the testimony of Gen. Sutter, and states that he saw the latter deliver a copy of the general title to Smith, and that, subsequently, he prepared a petition to Gen. Sutter soliciting another copy of the general title, as the first had been lost, with the accompanying documents, and that Gen. Sutter, knowing that fact, delivered a second copy as requested. The witness also states that the land claimed in this case was granted to Smith by the general title referred to, and he identifies a map as made by himself in 1844, on which the land now claimed is marked as the "Rancho de Yuba."

Gen. Sutter was re-examined in this court. His recollection, when making his last deposition, seems more uncertain and confused *that* when his testimony was first taken. He repeats, however, his former statements as to the facts we are considering, viz., that Smith applied for the land; that the petition was referred to him; that he reported favorably upon it; that he delivered a copy of the general title to Smith; and that, on its being proved to him "by many persons" that the first copy was lost, he gave or sent to Smith a second copy. When asked how the loss of the first copy was proved, he replies, When a man like Bidwell told me anything I believed it like the "gospel." There can, I think, be no room for doubt, under this testimony, that Smith was one of those in whose favor the general title issued. His own testimony has been taken to prove the loss of the copy delivered to him, and of the other documents. It is objected that it has since appeared; that he has, or pretends to, some interest in the land, notwithstanding his conveyance to the present claimants. A bill of complaint is exhibited, in which he prays that that sale may set aside on the ground of fraud. The objection was not taken, however, at the time he testified; and besides, his own evidence as to the loss of the documents would clearly be admissible, notwithstanding his interest. His account is corroborated by the testimony of Sutter and Bidwell—witnesses of whom it may be observed that they are of a class unfortunately too small upon whose veracity this court can place reliance. It is not to be forgotten that the production of the copy of the general title is only important as showing that the party producing it was one of those intended to be benefited by the original. The interest passed by virtue of the original, and it passed to those persons who are referred to in it, though they are not named. The only inquiry therefore is, was the claimant one of those persons? To establish this, no secondary evidence of the contents of the copy delivered to him is necessary. It is the fact that he was one of those in whose favor Sutter had reported, which fixes his rights, and identifies him as one of the intended grantees; that he did petition for the land; that Sutter reported favorably on his petition. That a copy of the original grant was given to him at the time, as one of the original grantees, is clearly proved. His rights are therefore established, whatever may have become of the copy delivered to him; that copy being in no sense the instrument which conveyed the title, but only a means of showing by its production what other testimony has sufficiently proved. But, in order to ascertain what lands were granted, reference must be had to his petition, for it was the land therein solicited which the governer granted, and secondary evidence of the contents of the petition must, of course, in the absence of the original, be resorted to. That the petition and accompanying documents were lost, is, I think, sufficiently shown, not only by Smith's own testimony, but by that of Sutter and Bidwell, and still

more conclusively by the fact that a 2d copy of the grant was delivered to the grantee—a proceeding absurd, and without a motive, unless the first had been lost. It is suggested that due diligence has not been shown to obtain this 2d copy; but the only document as to which secondary evidence is important is the petition, and of this it does not appear that any copy was made. The petition not being produced, the fact that the land now claimed was that solicited in it must be established by other testimony.

Maj. Bidwell testifies that he is well acquainted with the land, and he states its boundaries, and that it was granted to Smith by Micheltorena. A map is also identified by him as made by himself in 1844, in which the land now claimed is delineated under the name of "Rancho de Yuba." Gen. Sutter testifies that John Smith petitioned Gov. Micheltorena for 6 leagues of land, accompanying his petition, with a map or diseño drawn, as witness understood, by Maj. Bidwell. He, Smith, (the witness says,) was in possession, by his authority, of this land, the boundaries of which correspond with the map referred to in the deposition of Bidwell. The witness on his cross-examination says that he examined the original diseño when the expediente was referred to him for his "informé;" that he was well acquainted with the ground, and that the boundaries as testified to by Maj. Bidwell, and delineated on the map referred to by him, correspond with those on the diseño which accompanied the petition. When subsequently examined, the witness declared his inability to specify the boundaries of the land petitioned for, or to give a particular description of the diseño which accompanied the petition. He even states that he cannot recollect the quantity of land applied for by Smith. It is not very easy to reconcile the accurate recollection exhibited in the first deposition of Gen. Sutter, with the confusion and forgetfulness shown in his last. Perhaps the lapse of time may, in some degree, have impaired his memory, though it is strange that two years should have so completely obliterated the recollection of events which in 1855 he so freshly remembered. If we were compelled to rely upon Gen. Sutter's testimony alone to ascertain the land which Smith petitioned for, and which was granted to him, we should perhaps be obliged to reject the claim. The testimony of Bidwell, however, is explicit, and identifies the land granted to Smith. Smith himself swears that he petitioned for and obtained the Rancho de Yuba; and that he claimed to own it is evident from the testimony introduced on the part of the U. S.; for, in 1848, he sold out to Nye and Foster, from whom the claimants derive title, his interest in the land now in controversy. The fact that so soon after the acquisition of the country he claimed to own this land under the title derived from Micheltorena, shows that the claim now urged is no recent invention, and corroborates the testimony of Sutter and Bidwell, that the tract now claimed was that originally petitioned

for and granted to him. Upon the whole, I think it sufficiently proved not only that Smith was one of the intended grantees under the general title, but that the land petitioned for by him, and by that instrument granted, was the Rancho de Yuba claimed in this suit. The next inquiry is, was the vested interest so acquired forfeited during the existence of the former government by such unreasonable neglect to perform the conditions, as to justify the presumption that the grantee had abandoned his grant? The evidence shows that, before obtaining his grant, Smith had purchased from Gen. Sutter one league of land, and had built a house upon it. The land he solicited immediately adjoined this tract, and it would seem from the proofs that the 2d house built by Smith was also within the limits of his purchase, and not within those of his grant. This is certainly the case if the boundaries of Sutter's grant be located according to the preliminary survey made of it. It may be admitted, therefore, that Smith never built a house within the limits of the 6 leagues granted, but that he resided in a house built on the land purchased by him which immediately adjoined it. His cattle, however, ranged over the large tract, and he appears to have claimed and been recognised as possessing both tracts until 1848, when he sold out to Nye and Foster. It seems to me that this occupation was sufficient to satisfy the Mexican law. When a sobrante or overplus was granted to one who had previously obtained a grant of a portion of the land included within natural boundaries, it was not expected that he should build a second house, and reside on both tracts at once. So, also, when an augmentation or additional grant was made, the additional quantity was added to that first granted, and both formed one whole. If Smith then was residing, and had built a house upon the one league purchased, and then obtained from the government an additional six leagues immediately adjoining it, he must be considered from that time as occupying the whole 7 leagues, or the whole tract, upon a portion of which he continued to reside. Certainly such an occupation repels all idea that he had abandoned his grant, and it is only when the neglect to fulfil the conditions has been so unreasonable as to justify the presumption of abandonment, that we are authorized, under the principles laid down by the Supreme Court, to declare his claim forfeited.

It is further objected, that the general title only grants to those citizens who have obtained the favorable report of Gen. Sutter, the lands solicited by them respectively, and that it is not shown that Smith was a citizen. It appears that Smith is a native of *Canad* or New Brunswick; that he came to this country in 1835. He swears himself that he was naturalized; but he does not produce his papers or give secondary evidence of their contents—they were lost with the other documents. It appears, however, that Gen. Sutter delivered to him a copy of the title, as one of those referred

to in it. Gen. Sutter was at that time military commandant of the frontier, and exercised civil jurisdiction in that portion of Upper California. He was directed to deliver a copy of the title to a certain class of persons described in it. It is to be presumed that, as an officer of the Government, he did his duty, and acted within the limits of his authority. The fact, therefore, that Smith was recognised by him as one of those entitled to receive a copy of the grant, and that he delivered a copy to him as such, should, when corroborated by the oath of Smith himself, be received as sufficient to bring him within the class of persons in whose favor the grant issued.

The claim was confirmed by the board, and I see no reason to reverse their decision.

May 2, 1857.

At a stated term of the district court of the United States of America for the northern district of California, held at the courthouse in the city of San Francisco on Monday, the fourth day of May, in the year of our Lord one thousand eight hundred and fifty-seven.

Present, the Honorable Ogden Hoffman, district judge.

Decree.

THE UNITED STATES vs. JOHN ROSE et al. } No. 312.—On appeal from decision of the Board of Land Commissioners, &c.

This cause, coming on this day to be heard, was argued by counsel; and thereupon, in consideration thereof, this court is of opinion that there is no error in the decision of the board of land commissioners to ascertain and settle private land claims in California, confirming this claim, and that the said decision should be and is hereby affirmed; and this court doth order, adjudge, and decree that the claim of the said petitioners is valid, and that the same be and is hereby confirmed to them. The land, of which confirmation is hereby made, is situated in the county of Yuba, embracing six square leagues, and is bounded as follows, to wit: on the north by Yuba river, on the west by lands of John A. Sutter, on the south by the line of Johnson's rancho; reference being had to the deposition of John A. Sutter, on file in this case, for further particulars, and to the traced copy of the map of the land claimed, contained in the transcript of the record from said board of land commissioners.

OGDEN HOFFMAN, *U. S. Dist. Judge.*

This decree is correct.

WM. BLANDING,
U. S. Dist. Att'y.

Endorsed: Filed May 4th, 1857.

JOHN A. MONROE, *Clerk.*
By W. H. CHEVERS, *Deputy.*

Opinion on Motion to Grant Appeal.

THE UNITED STATES
vs.
JOHN ROSE et al.

An appeal is moved in this case by the district attorney. The motion is opposed on the ground that the court has no power to grant an appeal after the expiration of the time at which the decree has been rendered.

The question raised is important, for it is understood that there are several cases in which decrees were rendered during the last term, and in which no appeal was taken during that term.

By the act of 1851 no period is expressly mentioned within which the appeal must be taken.

The language of the 10 § is, the district court shall proceed to render judgment, &c., "and shall, on the application of the party against whom judgment is rendered, grant an appeal to the Supreme Court."

It is contended that the word "appeal" imports, ex vi termini, a proceeding taken sedente curiâ, or during the session of the court at which the decree apealed from is rendered.

It was early decided by the Supreme Court that the term "appeal" in the judicial act of 1789 must be understood in its technical sense, expressive of the civil law mode of removing a cause to a higher tribunal, and not in its popular sense, as descriptive of appellate jurisdiction, without regard to the manner in which the cause is transmitted to that jurisdiction. 7 Cranch, 108 et 387; 2 Wheat., 248.

The term "appeal" is undoubtedly used in the same sense in the act of 1851, and denotes the civil law mode of transferring a cause to a superior tribunal for a re-trial of the matters of fact, as well as of law, as distinguished from a writ of error, by which errors in matters of law were alone submitted for revision.

The question then arises whether an "appeal," according to the import of the term in the civil law, or as used in the proceedings of those courts in England and the United States whose practice is based upon the rules of the civil law, or as used in the acts of Congress, necessarily denotes a proceeding to be taken in open court, and during the term at which the decree appealed from is redeemed.

By the Roman law up to the time of Justinian, appeals viva voce were allowable on the day the sentence was pronounced. Cod. de Appell., 7, 62, 14; Dig. 49, 1, 2.

A little more time was given for an appeal in writing, according to Alpian Dig. 49, 1, § 11; two days to one acting in his own cause; three days to one acting in a representative capacity, such as tutor curator. But various impediments or excuses were received to mitigate the rigor of this prescription.

Justinian, in his 23 Novel, cap. 1, after alluding to the evils of this short and double period, enacts that in all cases a delay of 10 days should be given to be computed from the reading of the sentence. Such appears to have been the law of Spain, though the time was subsequently restricted to five days. Nov. Recop., lib. 11, tit. 20, law 1.

By the practice of the ecclesiastical and admiralty courts in England, appeals from a definitive sentence may be either "apud actu" at the time of the sentence, viva voce in presence of the judge, or in scriptis, reduced to writing within 10 (or in the ecclesiastical courts 51) days, before a notary.

In appeals from the high courts of chancery to the House of Lords, the first step is a notice of appeal; the next a petition of appeal, which is presented to the lords, and on which a summons issues to the respondent. These petitions of appeal are by statute limited to five years.

By the acts of Congress appeals are made subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. These rules were decided by the Supreme Court in the case of "The San Pedro," (2 Wheat., 132,) to be those contained in the 22d and 23d sections of the act of 1789, and they relate to the time within which a writ of error may be brought and when it shall operate as a supesedeas; the citation to the adverse party, the security, &c.

All these regulations are, in the opinion of the Supreme Court, applicable to appeals under the act of 1803, and are to be substantially observed. In analogy, then, to the practice in cases of writs of error a copy of the appeal is served upon the adverse party, by lodging it in the clerk's office, and a citation is served upon him, as required by the 22d and 23d secs. of the act of 1789. The Supreme Court have recognised, however, the practice of taking an appeal in open court, or entering it during the session of the court at which the decree appealed from is pronounced. In such case, the personal citation is held not to be indispensable, (Riley vs. Lamar, 2 Cranch, 344,) and perhaps the service of the notice of appeal would be held to be unnecessary, for the same reason.

It thus appears that, although originally appeals may have been taken in open court, yet the practice of all the courts proceeding according to the forms of the civil law, the appeal may be taken out of court in different modes prescribed by law, or by the rules of court. That the time within they are to be taken, in like manner, expressly limited; but it in no case refers to the term of the court pronouncing the decree, the distinction between term time and vacation being, so far as I am informed, wholly unknown to the civil law, although the mode of appealing "in scriptis," or before a notary, is not admissible in our practice. Yet another mode of effecting the same object by a proceeding out of court, is

authorized by statute; and we have seen that in the ecclesiastical and admiralty courts of England that manner of taking appeals is still allowed. There would seem, therefore, no ground for the idea that an appeal means ex vi termini, a proceeding in open court, to be taken of necessity during the term at which the decree is pronounced. Two decisions of Judge Story have been cited by the counsel for the claimants in support of their position:

Norton vs. Rich., 3 Mason, 442, and the Steamboat New England, 3 Sum., 495.

It appears to me that those cases corroborate the views above expressed.

The judiciary act of 1789 directed that appeals from the district court should be taken to the "next circuit court," provided no mode of taking the appeals. The case was, therefore, supposed by Judge Story to be untouched by statute. Whether the provisions of the act of 1803 do not apply to appeals from the district to the circuit court, as well as to those from the latter to the Supreme Court, may admit of doubt. The provisions of the act of 1803 do not seem to have been brought to the notice of Judge Story. But assuming that the law makes no provision whatever on the subject, except to allow the naked right of appeal to the next circuit court, the case presented to Judge Story does not materially differ from that submitted to this court.

If, therefore, the word appeal necessarily imported a proceeding sedente curiâ and viva voce, he would have determined that no appeal could be taken in any other manner. But such is not his decision. On the contrary, he states that the district courts may require the appeals to be taken either sedente curiâ and before an adjournment sine die, "or afterwards, within a fixed time, in the clerk's office."

As in the Massachusetts district no rules as to appeals had been established, but the uniform course from the earliest period had been to take appeals in open court, before the adjournment, this practice was considered equivalent to a rule, and obligatory upon all parties.

The case of the steamboat New England, so far as it relates to the point under discussion, affirms the decision of Rich and Norton, and avowedly proceeds on its authority.

It is evident that in these cases appeals were required to be taken sedente curiâ and before adjournment, solely because the rules of court or a long continued uniform practice, equivalent to a rule, had so provided, and not because the right of appeal conferred by statute imported such a proceeding, and none other.

Had such been Judge Story's construction of the term, he would not have admitted the power of the court to enlarge or abridge the right.

The 152d rule of the district court for the southern district of

New York affirms the same principle. That rule provides that appeals may be entered within 10 days from the time of rendering the decree: "A brief notice in writing to the clerk and opposite proctor, that the party appeals in the cause shall be a sufficient entry of the appeal, without any petition to the court for leave to enter the same." Under this rule appeals are entered in the clerk's office within the time limited, but wholly without regard to the adjournment of the court, and the practice of taking an appeal in open court at any time before its adjournment has fallen into disuse—if, indeed, it be any longer admissible.

I think it clear that the term "appeal," according to the practice of all courts proceeding according to the forms of the civil law, has no such meaning as that attributed to it in the argument.

But even if this were doubtful, the question would still arise whether Congress intended to use it in the act of 1851 in any such limited and doubtful sense. Had the intention of Congress been to prescribe a period shorter than that allowed by the general laws regulating appeals, some limitation would probably have been fixed as in the act of 1824 and 1828; by the first of which, 12 months, and by the second 4 months, were allowed.

They hardly would have left the limitation to be inferred from the use of the word "appeal" in a sense different from that in which it is elsewhere used in legislation, and when the period thus allowed *vary* from six months to a few months, depending upon whether the decree was rendered at the begining or the end of the term.

It seems far more probable that Congress used the term as it is known in the acts of Congress, and as importing a proceeding to be taken within five years from the date of the decree. Such a limitation would no doubt be applied should the case arise, and very possibly the court, in the absence of express regulations on the subject, would be authorized to fix by its rules a reasonable period within which the appeal is to be taken, as has been done by the district courts sitting in admiralty cases of appeal to the circuit court, which are in like manner unprovided for by statute. No such rules have, however, been established by this court, the practice having been to grant the appeal whenever moved for.

The objection we have considered has only recently been raised, and if suffered to prevail, would operate as a surprise upon the United States as well as upon claimants, who, in ignorance of any such implied limitation on the right of appeal, have omitted to move for it before the expiration of the term at which the decree was rendered. For the reasons above stated, we think the objection cannot be sustained.

It may be observed, in conclusion, that the question presented is, in its own nature, more fit for the consideration of the superior tribunal to which an appeal is sought, than for that of the inferior

court, from which an appeal is taken. A preliminary motion to dismiss the appeal as irregularly taken may be made before the Supreme Court, and the question finally determined; whereas a refusal by this court to allow the appeal would involve the delay of a mandamus to this court, until the return of which the decision of the point would necessarily be deferred.

Endorsed: Filed Nov. 4, 1857.

JOHN A. MONROE, *Clerk.*
By J. EDGEN GRYMES, *Deputy.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court-room in the city of San Francisco, on Wednesday, the fourth day of November, in the year of our Lord one thousand eight hundred and fifty-seven. Present, the Honorable Ogden Hoffman, district judge.

Order Granting Appeal.

THE UNITED STATES vs. JOHN ROSE et al. } D. C. 312.—L. C. 605.

In this case, on the application of the U. S. attorney, made in open court, it is ordered by the court that an appeal in behalf of the United States from the final decision of this court, rendered in said cause at the Dec. 1856 term, be, and the same is hereby, granted, and that a certified transcript of the pleadings, evidence, depositions, and proceedings in the said cause be sent to the Supreme Court of the United States without delay; and the appellant is ordered to serve the usual citation according to law.

(Signed) OGDEN HOFFMAN,
U. S. Dist. Judge.

Endorsed: Filed November 4th, 1857.

JOHN A. MONROE, *Clerk.*
By J. EDGEN GRYMES, *Deputy.*

I, John A. Monroe, clerk of the district court of the United States for the northern district of California, do hereby certify the annexed pages, from one to ninety-one inclusive, contain a full, true, and correct transcript of the record on file from the board of land commissioners, together with the pleadings, depositions, orders, opinions, and decrees filed in this office, in the case entitled "John Rose vs. The United States."

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, the nineteenth day of November, [SEAL.] A. D. 1857, and of the independence of the United States of America the eighty-second.

JNO. A. MONROE, *Clerk.*

Filed 5th March, 1858.